

ERIK J. GIRVAN\*

# When Our Reach Exceeds Our Grasp: Remedial Realism in Antidiscrimination Law

Abstract .....	360
Introduction .....	361
I. Antidiscrimination Law Targets Purposeful Discrimination Even Though Most Discrimination Is Likely Not Purposeful .....	366
A. The Legal Standard .....	366
B. The Psychological Science.....	371
II. Understanding the Antidiscrimination Law-Science Gap in Order to Close It .....	377
A. Judicial Ignorance of Psychological Science .....	379
B. Absence of Acceptable Remedies .....	381
C. Two Antidiscrimination Law Case Studies.....	389
1. The Death Penalty .....	390
2. Discretionary Standards in Employment Discrimination .....	398
III. Available Alternatives .....	405

---

\* Assistant Professor, University of Oregon School of Law; J.D., Harvard Law School; Ph.D. (Psychology), University of Minnesota. Thank you to Elizabeth Tippet, Ifeoma Ajunwa, Chad Oldfather, and Andrea Freeman as well as the attendees of the Marquette University Law School Junior Faculty Works-in-Progress conference for their valuable comments. In addition, for the opportunity to present aspects of this research project and the valuable feedback and suggestions on how to develop it, I would also like to thank Richard Wiener, Steven Willborn, and other attendees at the University of Nebraska–Lincoln’s Future Directions in Psychology, Public Policy, and the Law conference; Justin Levinson and attendees at the University of Hawai’i, Manoa School of Law’s New Directions In Law & Psychology symposium; and Christopher Drahozal and other faculty at the University of Kansas School of Law. I would also like to thank Ariana Denley and Nathan Held for their research assistance on this project. Any errors are my own.

A. Addressing Implicit Bias .....	410
B. Alternative Remedies Strategies .....	414
Conclusion.....	417
Appendix A: Cases Rejecting Implicit Bias .....	419
Appendix B: Cases Accepting Implicit Bias .....	421
Appendix C: Concurrences, Dissents, or Implied Acceptance of Implicit Bias .....	422

### ABSTRACT

Judges limit antidiscrimination rights to cases involving purposeful discrimination. Recent social psychological evidence for “implicit bias,” however, shows that people injure others by discriminating even when they do not intend to do so. Advocates of the behavioral realism approach argue that such gaps between the assumptions judges inevitably make about human behavior when interpreting legal doctrine and available social scientific evidence should be closed or justified explicitly on other grounds. Closing the gaps, however, requires understanding why they developed and persist, so that an appropriately responsive strategy can be developed. This Article argues that the law-science gap exists and persists in significant part because judges believe that they lack the ability to effectively remedy non-purposeful discrimination of the kind described by work on implicit bias and are unwilling to take the steps necessary to develop ways to do so. To illustrate, this Article reviews major developments in antidiscrimination doctrine related to discretionary decisions in two different domains—the death penalty and employment decisions—and highlights the role that judicial concerns about remedies plays in the opinions supporting those developments. In order to more effectively impact the doctrinal development in that area, this Article discusses concrete ways that the remedies understanding of the law-science gap can help guide social scientists, legal scholars, and advocates for expanded antidiscrimination rights.

*Ah, but a man's reach should exceed his grasp,  
Or what's a heaven for?*

*-Robert Browning<sup>1</sup>*

---

<sup>1</sup> ROBERT BROWNING, ANDREA DEL SARTO, *reprinted in* ROBERT BROWNING: SELECTED POEMS 385, 395 (John Woolford et al. eds., 2013).

## INTRODUCTION

Scholars working at the intersection of law and psychology often find that there are substantial gaps between what the science tells us about how people behave and the behavioral assumptions that are embodied in legal doctrine. One prominent example is the assumption, captured in procedural doctrine regarding who has the burden of proof, that eyewitnesses are generally reliable, particularly if they are confident in their identifications. By comparison, there is an enormous body of forensic psychological research demonstrating not only that eyewitnesses are frequently unreliable, but systematically so. When presented with evidence of this gap, a small number of courts have taken the step of affirmatively altering their procedural doctrine to better reflect the science.<sup>2</sup> Others refuse to do so and instead follow the typical procedural and evidentiary rules but allow social scientists to testify as experts in particular cases about research on the limits of the accuracy of eyewitness identification.<sup>3</sup> Finally, some who are skeptical

---

<sup>2</sup> Oregon and New Jersey have integrated modern psychological science into their doctrinal tests for witness reliability. *State v. Henderson*, 27 A.3d 872, 918–22 (N.J. 2011); *State v. Lawson*, 291 P.3d 673, 685 (Or. 2012); Stephen A. Saltzburg, *Judicial Innovations to Screen Eyewitness Identifications*, 28 CRIM. JUST. 38, 39–40 (2013) (explicating *Lawson*’s approach to evidence law); see also Keith A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence*, 47 GA. L. REV. 723, 750–51 (2013) (citing *Lawson*, 291 P.3d at 685 and *Henderson*, 27 A.3d at 918–22 as examples of courts “incorporat[ing] the new social science research into . . . reformulated standards for assessing eyewitness reliability”). Further, some states have modified their jury instructions about witness reliability based on modern science. See *Commonwealth v. Gomes*, 22 N.E.3d 897, 916–18 (2015) (proposing model jury instruction); cf. *State v. Cabagbag*, 277 P.3d 1027, 1039 (Haw. 2012) (holding that modified jury instructions are an adequate remedy for informing juries of problems with eyewitness reliability).

<sup>3</sup> *Perry v. New Hampshire*, 132 S. Ct. 716, 719 (2012) (“The rationale underlying this Court’s decisions, *Perry* asserts, calls for a rule requiring trial judges to prescreen eyewitness evidence for reliability any time an identification is made under suggestive circumstances. This Court disagrees.”); accord Mark S. Brodin, *Behavioral Science Evidence in the Age of Daubert: Reflections of a Skeptic*, 73 U. CIN. L. REV. 867, 889–91 (2005). Ten federal circuit courts of appeals forty-two states, and the District of Columbia accept only expert witness testimony on eyewitness reliability at the discretion of the trial court. See *United States v. Rodríguez-Berrios*, 573 F.3d 55, 70–72 (1st Cir. 2009); *United States v. Bartlett*, 567 F.3d 901, 906–07 (7th Cir. 2009); *United States v. Brownlee*, 454 F.3d 131, 140–44 (3d Cir. 2006); *United States v. Rodríguez-Felix*, 450 F.3d 1117, 1125–26 (10th Cir. 2006); *United States v. Martin*, 391 F.3d 949, 953–54 (8th Cir. 2004); *United States v. Smithers*, 212 F.3d 306, 310–18 (6th Cir. 2000); *United States v. Lumpkin*, 192 F.3d 280, 288–89 (2d Cir. 1999); *United States v. Rincon*, 28 F.3d 921, 923–27 (9th Cir. 1994); *United States v. Harris*, 995 F.2d 532, 534–36 (4th Cir. 1993); *United States v. Moore*, 786 F.2d 1308, 1312–13 (5th Cir. 1986); *Ex parte Williams*, 594 So. 2d 1225, 1227 (Ala. 1992); *Skamarocius v. State*, 731 P.2d 63, 65–66 (Alaska Ct. App. 1987); *State v. Nordstrom*, 25 P.3d 717, 730 (Ariz.

of the value of the research have a default rule that the science is not admissible.<sup>4</sup>

At a general level, this Article is a discussion and analysis of why judges, when given the opportunity, do not do a better job of conforming their assumptions about human behavior to available social science. Rather than the impact of psychological research regarding limitations of eyewitness testimony on criminal procedure, this Article engages with the gap between psychological research on the pervasiveness of non-purposeful discrimination and legal doctrine that

---

2001) (en banc), *abrogated on other grounds by* State v. Ferrero, 274 P.3d 509 (Ariz. 2012) (en banc); Parker v. State, 968 S.W.2d 592, 596–97 (Ark. 1998); People v. McDonald, 690 P.2d 709, 719–21 (Cal. 1984), *overruled on other grounds by* People v. Mendoza, 4 P.3d 265 (Cal. 2000); Campbell v. People, 814 P.2d 1, 7–8 (Colo. 1991) (en banc), *abrogated by* People v. Shreck, 22 P.3d 68 (Colo. 2001) (en banc); State v. Guilbert, 49 A.3d 705, 726–31 (Conn. 2012); Garden v. State, 815 A.2d 327, 338–39 (Del. 2003), *superseded by statute on other grounds*, DEL. CODE ANN. tit. 11, § 4209(d) (2003); Benn v. United States, 978 A.2d 1257, 1269–70 (D.C. 2009); McMullen v. State, 714 So. 2d 368, 373 (Fla. 1998); Howard v. State, 686 S.E.2d 764, 770–71 (Ga. 2009); State v. Wright, 206 P.3d 856, 860–65 (Idaho Ct. App. 2009); Cook v. State, 734 N.E.2d 563, 569–71 (Ind. 2000); State v. Schutz, 579 N.W.2d 317, 319–20 (Iowa 1998); State v. Carr, 331 P.3d 544, 689–90 (Kan. 2014), *rev'd on other grounds*, 136 S. Ct. 633 (2016); Commonwealth v. Christie, 98 S.W.3d 485, 488–92 (Ky. 2002); State v. Kelly, 752 A.2d 188, 191–92 (Me. 2000); Bomas v. State, 987 A.2d 98, 106–14 (Md. 2010); People v. Carson, 553 N.W.2d 1, 4–5 (Mich. Ct. App. 1996); State v. Miles, 585 N.W.2d 368, 371–72 (Minn. 1998); Corrothers v. State, 148 So. 3d 278, 293–98 (Miss. 2014); State v. Ware, 326 S.W.3d 512, 526–29 (Mo. Ct. App. 2010); State v. DuBray, 77 P.3d 247, 254–55 (Mont. 2003); State v. Trevino, 432 N.W.2d 503, 517–18 (Neb. 1988); White v. State, 926 P.2d 291, 292 (Nev. 1996); People v. LeGrand, 867 N.E.2d 374, 377–80 (N.Y. 2007); State v. Lee, 572 S.E.2d 170, 175–76 (N.C. Ct. App. 2002); State v. Fontaine, 382 N.W.2d 374, 377–78 (N.D. 1986); State v. Buell, 489 N.E.2d 795, 801–04 (Ohio 1986); Torres v. State, 962 P.2d 3, 20 (Okla. Crim. App. 1998); Commonwealth v. Walker, 92 A.3d 766, 790–93 (Pa. 2014); State v. Werner, 851 A.2d 1093, 1101–03 (R.I. 2004); State v. Whaley, 406 S.E.2d 369, 371–72 (S.C. 1991); State v. McCord, 505 N.W.2d 388, 391–95 (S.D. 1993); State v. Copeland, 226 S.W.3d 287, 300–04 (Tenn. 2007); Weatherred v. State, 15 S.W.3d 540, 542–43 (Tex. Crim. App. 2000); State v. Clopten, 223 P.3d 1103, 1112–17 (Utah 2009); State v. Percy, 595 A.2d 248, 252–53 (Vt. 1990); Currie v. Commonwealth, 515 S.E.2d 335, 338–39 (Va. Ct. App. 1999); State v. Cheatam, 81 P.3d 830, 840–43 (Wash. 2003) (en banc); State v. Taylor, 490 S.E.2d 748, 753 (W. Va. 1997); State v. Shomberg, 709 N.W.2d 370, 375–77 (Wis. 2006); Engberg v. Meyer, 820 P.2d 70, 79–80 (Wyo. 1991).

<sup>4</sup> Two jurisdictions retain the per se exclusion of expert testimony on eyewitness reliability: the United States Eleventh Circuit Court of Appeals and Louisiana. *United States v. Smith*, 122 F.3d 1355, 1358 (11th Cir. 1997) (refusing to overturn per se exclusion rule because trial court did not abuse discretion under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)); *State v. Young*, 35 So. 3d 1042, 1050 (La. 2010) (“By merely being labeled as a specialist in eyewitness identifications, an expert has the broad ability to mislead a jury through the ‘education’ process into believing a certain factor in an eyewitness identification makes that identification less reliable than it truly is.”).

requires that a plaintiff show purposeful intent.<sup>5</sup> The converging results of a substantial body of research in social psychology and related disciplines suggests that people often discriminate against others based on race, gender, and other ostensibly legally protected characteristics, even when it is not their purpose to do so. Such “implicit bias,” as it is conventionally known, is thought to be largely a byproduct of the ways in which we automatically categorize information, including other people and ourselves.<sup>6</sup> As a result, people tend to see, interpret, understand, and respond to events differently depending upon the demographic characteristics of those involved even when it is contrary to their values to do so: “Yet an uncomfortable starting point is to understand that racial stereotyping remains ubiquitous, and that the challenge is not a small number of twisted white supremacists but something infinitely more subtle and complex: People who believe in equality but who act in ways that perpetuate bias and inequality.”<sup>7</sup> Thus, based upon our best scientific understanding, judges should fully expect to see cases in which people are injured by discrimination that

---

<sup>5</sup> The disparate impact action recognized by courts under statutes such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012), and the Fair Housing Act, 42 U.S.C. §§ 3601–31, allow for limited forms of liability and remedies for decisions that are unjustifiably discriminatory, irrespective of the cause of the discrimination. Thus, they can encompass decisions affected by implicit or “unconscious” bias or “subconscious stereotypes and prejudices.” *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2522–23 (2015); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990–91 (1988). The distinction between disparate treatment and disparate impact, however, is a legal one built around procedural and policy considerations from that domain, not a psychological one that necessarily tracks the contours of the phenomenon of discrimination. Accordingly, this Article discusses both disparate treatment and disparate impact cases where they provide good illustrations of the judicial considerations relevant to the law-science gap and remedies perspective. Even so, as a practical matter, the primary focus of this Article is on identification of the gap and application of that perspective to situations in which defendants continue to have no legal obligation to address one of the primary sources of discrimination in fact: those presently classified as disparate treatment cases.

<sup>6</sup> For a discussion of some of the psychological and social science research evidencing implicit bias in the law, see Erik J. Girvan, *On Using the Psychological Science of Implicit Bias to Advance Anti-Discrimination Law*, 26 GEO. MASON U. C.R. L.J. 1 (2015); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006); and Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).

<sup>7</sup> Nicholas Kristof, *Is Everyone a Little Bit Racist?*, N.Y. TIMES (Aug. 27, 2014), <http://www.nytimes.com/2014/08/28/opinion/nicholas-kristof-is-everyone-a-little-bit-racist.html>.

occurred without any malicious or purposeful intent on the part of the defendant.<sup>8</sup>

Judges construing a range of antidiscrimination laws, including the Equal Protection Clause of the Fourteenth Amendment and provisions in civil rights statutes such as Title VII, however, continually hold that plaintiffs must prove that defendants acted with purposeful intent.<sup>9</sup> The result is numerous cases in which plaintiffs are alleging disparate treatment, and in which there is substantial evidence that they have been treated detrimentally because of their race, gender, or status as a member of another protected category.<sup>10</sup> Nevertheless, the plaintiffs are found to have no right to recover because the defendants were found to have acted “in spite of,” not “because of,” the discriminatory outcome of their behavior.<sup>11</sup>

Where such law-science gaps exist, behavioral realists argue that legal scholars, judges, and others concerned about the accuracy, consistency, and validity of legal doctrine ought to address them overtly by bringing the behavioral assumptions supporting the doctrine, and doctrine itself, into conformity with the available science.<sup>12</sup> Alternatively, the judges should explain why the doctrine ought not to be changed based upon that information.<sup>13</sup> However, identifying what judges ought to do is different from describing what they actually do or finding ways to get them to do it. Viewed as a prescriptive jurisprudential project, behavioral realism presents a compelling and influential approach to legal analysis and critique. Its descriptive utility in proscribing the use of education and awareness of social science to actually achieve doctrinal change, however, has been limited. A Westlaw search for opinions in discrimination cases referencing “implicit bias” reveals more examples of cases in which a majority of judges indicated that they are aware of the concept but refuse to alter antidiscrimination doctrine accordingly than cases in which a majority of judges acknowledge evidence of implicit bias as justification for liability.<sup>14</sup>

---

<sup>8</sup> See generally Erik J. Girvan & Grace Deason, *Social Science in Law: A Psychological Case for Abandoning the “Discriminatory Motive” Under Title VII*, 60 CLEV. ST. L. REV. 1057 *passim* (2013) (collecting examples of language used by judges to describe what they mean by “discriminatory intent”).

<sup>9</sup> See *supra* Part I.A.

<sup>10</sup> See *supra* Part I.A.

<sup>11</sup> E.g., *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

<sup>12</sup> See, e.g., Girvan, *supra* note 6, at 79; Kang et al., *supra* note 6, at 1186.

<sup>13</sup> See, e.g., Girvan, *supra* note 6, at 71–73; Kang et al., *supra* note 6, at 1186.

<sup>14</sup> See *infra* Appendixes A–C.

Prior research articles have argued that the failure of social science to influence legal doctrine in the way that behavioral realism proscribes is due, in part, to a misplaced assumption that law-science gaps persist primarily because judges are unaware of the relevant science.<sup>15</sup> The substantial efforts of scholars and advocates to educate judges and others about implicit bias have been fairly successful in convincing the judges to try to change their own behaviors to reduce the effects of implicit bias. Even so, the judges who have directly discussed implicit bias have generally found that there is no liability for injury from it.<sup>16</sup> That work outlines several reasons why teaching judges about the social science of implicit bias, or introducing evidence for it, is unlikely to close the antidiscrimination law-science gap: Problems with using generalized social science to infer facts in particular cases, limits on the judicial role and expertise in policymaking, concerns of judicial economy, judicial ideology, and problems related to remedies.<sup>17</sup> For those who view implicit bias as a serious contemporary threat to equity and seek to use antidiscrimination law as a way to help reduce it, or at least compensate people who are likely to have been injured by it, developing an accurate understanding of why the law does not match the social science is a critical first step. Without it, efforts to close this, or any other, law-science gap will be considerably more difficult if not impossible.

This Article builds on the earlier work by further exploring one of the potential reasons for the law-science gap—a perceived or actual lack of acceptable remedies for non-purposeful discrimination—in more detail. Specifically, Part I describes the gap between the legal and psychological understanding of discrimination.<sup>18</sup> Part II presents two major alternative explanations for why the gap exists and persists: (1) an absence of scientific knowledge (i.e., that it is attributable, in large part, to a failure of judges to update the relevant legal doctrine to match

---

<sup>15</sup> See generally Girvan, *supra* note 6.

<sup>16</sup> See, e.g., *Pippen v. State*, 854 N.W.2d 1, 32 (Iowa 2014); *State v. Martin*, 773 N.W.2d 89, 110 (Minn. 2009); *State v. Saintcalle*, 306 P.3d 326, 341 (Wash. 2013).

<sup>17</sup> Girvan, *supra* note 6, at 68–78.

<sup>18</sup> For the convenience of the reader, this section directly recounts, summarizes, and augments the discussion of topics covered in more detail in some of the author's other contemporaneous research. See generally Girvan, *supra* note 6; Erik J. Girvan & Heather Marek, *Psychological and Structural Bias in Civil Jury Awards*, 8 J. AGGRESSION CONFLICT & PEACE RES. (forthcoming 2016) (manuscript at <http://dx.doi.org/10.2139/ssrn.2659875>); Erik J. Girvan, *Wise Restraints?: Learning Legal Rules, Not Standards, Reduces the Effects of Stereotypes in Legal Decision-Making*, 22 PSYCHOL. PUB. POL'Y, & L. 31 (2016).

advances in the psychological science of implicit bias) and (2) an absence of acceptable or workable remedies for implicit bias. In addition, this Article compares the ability of these alternatives to explain the evolution of antidiscrimination doctrine in two different areas of law: the death penalty and discretionary employment decisions. For each, this Article explains why the way in which doctrine has changed is consistent with the remedies perspective but not the lack-of-knowledge explanation. Part III, building on this case, describes several implications that the remedies perspective can have for the ways in which litigants, psychologists, and other advocates for closing the law-science gap in antidiscrimination proceed, as well as some of the weaknesses of these approaches.

## I

### ANTIDISCRIMINATION LAW TARGETS PURPOSEFUL DISCRIMINATION EVEN THOUGH MOST DISCRIMINATION IS LIKELY NOT PURPOSEFUL

#### *A. The Legal Standard*

The phrasing and intent of most antidiscrimination laws are consistent with the creation of liability for discrimination based on a person's race, sex, or status as a member of another protected category, irrespective of the intent of the person who discriminates.<sup>19</sup> Judges nevertheless have found that plaintiffs who bring antidiscrimination claims under the U.S. Constitution or for disparate treatment under Civil Rights statutes must prove that the defendant acted with a purpose to discriminate.<sup>20</sup> For example, the Equal Protection Clause of the

---

<sup>19</sup> See, e.g., Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1168 (1995).

<sup>20</sup> This point has been discussed at length elsewhere. See, e.g., *Developments in the Law—Race and the Criminal Process, Part VIII. Race and Capital Sentencing*, 101 HARV. L. REV. 1603, 1614 (1988); Randall L. Kennedy, *McClesky v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1404 (1988) (“In the race relations context, the most significant obstacle to federal judicial interference with sentencing decisions is the Supreme Court’s doctrine of purposeful discrimination.”); Girvan & Deason, *supra* note 8, at 1063; Girvan, *supra* note 6, at 10; Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 541 (1977) (“The Court rejected a nonmotivational theory of racial discrimination . . . , holding that the equal protection clause of the fourteenth amendment prohibits only government action undertaken with a ‘discriminatory purpose.’” (footnote omitted)); Note, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 YALE L.J. 328, 328 (1982) (“The 1976 decision of the Supreme Court in *Washington v. Davis* imposed a new burden upon equal protection plaintiffs: proof of invidious intent or purpose.” (footnote omitted)).



Fourteenth Amendment is broadly worded to create a right to equal treatment by the government and its officials:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*<sup>21</sup>

The primary goal of this provision was to help secure the civil rights of freed slaves.<sup>22</sup> Neither the text of the Amendment itself nor its primary goal conditions the duty of governmental officials to provide equal protection on their hostile intent or purpose to discriminate. In *Washington v. Davis*, however, the Supreme Court held that the Clause prohibits only those actions taken with a discriminatory purpose (i.e., in order to produce a racially disparate outcome), not those that merely have a discriminatory impact.<sup>23</sup> Following *Davis*, the Court reinforced and applied the purposeful intent requirement in a variety of Equal Protection Clause cases involving evidence of a substantial disparate impact. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,<sup>24</sup> for example, the Court found that denial of a zoning variance for a racially integrated housing project in an all-White Chicago suburb was constitutional<sup>25</sup> because the plaintiffs could not show that racial discrimination was “a motivating factor in the decision.”<sup>26</sup> Similarly, in *Personnel Administrator of Massachusetts v. Feeney*, the Court confirmed that knowing that a governmental action would produce a discriminatory outcome did not violate the Equal Protection Clause so long as it was done “in spite of” rather than “because of” that result.<sup>27</sup>

---

<sup>21</sup> U.S. CONST. amend. XIV, § 1 (emphasis added). With respect to the federal government, the Supreme Court has found that, in practice, the Due Process Clause of the Fifth Amendment incorporates the protections of the Equal Protection Clause in the Fourteenth Amendment. See *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954), *supplemented sub nom.* *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955).

<sup>22</sup> See *Strauder v. West Virginia*, 100 U.S. 303, 306–07 (1879) (citing *Slaughter-House Cases*, 83 U.S. 36, 72 (1872)), *abrogated by* *Taylor v. Louisiana*, 419 U.S. 522 (1975).

<sup>23</sup> *Washington v. Davis*, 426 U.S. 229, 239 (1976); see also *Perry*, *supra* note 20, at 543.

<sup>24</sup> *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

<sup>25</sup> *Id.* at 255–60 (of the suburb’s 64,000 residents, approximately 27, or 0.04%, were Black).

<sup>26</sup> *Id.* at 265–66. For a more robust discussion of psychology and the law of a “discriminatory motive,” see generally Girvan & Deason, *supra* note 8.

<sup>27</sup> *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (internal quotation marks omitted); see also *Hayden v. Paterson*, 594 F.3d 150, 163, 168 (2d Cir. 2010) (“Absent any adequately supported factual allegations as to discriminatory intent behind the enactment of

Equally well documented are the intent-based restrictions on the disparate treatment cause of action under antidiscrimination statutes,<sup>28</sup> such as Title VII, the Equal Employment Opportunities subchapter of the Civil Rights Act of 1964.<sup>29</sup> As with the Equal Protection Clause, by its terms, section 2000e-2 of Title VII is broadly worded to prohibit employers from treating an employee differently “because of” the individual’s race, color, religion, sex, or national origin:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual’s race, color, religion, sex, or national origin; . . .<sup>30</sup>

The phrase “because of” arguably encompasses all manner of causality irrespective of the employer’s intent, including negligent, reckless, knowing, and purposeful actions.<sup>31</sup> Justice Alito’s recent dissent in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*<sup>32</sup> illustrates this point nicely. Joined by Chief Justice Roberts, and Justices Scalia and Thomas, Justice Alito argued that the plain meaning of the phrase “because of” in a similar provision of the Fair Housing Act should be interpreted as a restriction on claims under the Act to only those in which there is a

---

the 1894 constitutional provision, we are compelled to find that the New York Constitution’s requirement that the legislature pass felon disenfranchisement laws is based on the obvious, noninvidious purpose of disenfranchising felons, not Blacks or Latinos.”); *United States v. Blewett*, 746 F.3d 647, 671–72 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1779 (2014); *Ashcroft v. Iqbal*, 556 U.S. 662, 676–77 (2009).

<sup>28</sup> Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination*, 73 MO. L. REV. 83, 84–85 (2008).

<sup>29</sup> The antidiscrimination statutes include the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12,101–12,213 (2012), the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621–634, Title VII of the Civil Rights Act of 1964 (Title VII), Pub. L. No. 88-352, §§ 701–716, 78 Stat. 241, 253–266 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17), Amendments to Title VII in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.), and the Fair Housing Act (FHA), 42 U.S.C. §§ 3601–3631. For convenience and brevity, this Article uses Title VII as an example. The thrust of the argument, however, applies beyond the particularities of this statute and regulatory framework.

<sup>30</sup> 42 U.S.C. §§ 2000e-2(a) (2012) (emphasis added).

<sup>31</sup> Girvan & Deason, *supra* note 8, at 1061–63.

<sup>32</sup> *Texas Dep’t of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2532 (2015) (Alito, J., dissenting).

finding of intentional discrimination.<sup>33</sup> To illustrate the common usage and support his argument, he collected fourteen *Washington Post* articles published on January 21, 2015, the day the case was argued, each of which use the phrase “because of.”<sup>34</sup> Undermining the argument, however, several of the examples use “because of” for factual causality, including physical or structural processes or constraints, the operation and impact of which occur without intent of any kind:

- “Berman, Jury Selection Starts in Colo. Shooting Trial, p. A2 (‘Jury selection is expected to last four to five months *because of* a massive pool of potential jurors’);”<sup>35</sup>
- “Hicks, Post Office Proposes Hikes in Postage Rates, p. A19 (‘The Postal Service lost \$5.5 billion in 2014, in large part *because of* continuing declines in first-class mail volume’);”<sup>36</sup>
- “Letter to the Editor, Metro’s Safety Flaws, p. A20 (‘[A] circuit breaker automatically opened *because of* electrical arcing’).”<sup>37</sup>

Consistent with Justice Alito’s examples of the plain meaning of the phrase “because of,” judges have an ample basis upon which to construe this language as a prohibition on adverse actions that were factually caused by race, irrespective of the employer’s intent. Indeed, because it does not require evidence of intentional discrimination, the disparate impact theory is often characterized as serving this exact role.<sup>38</sup> Courts, however, have been reluctant to embrace disparate impact theory in situations in which the challenged practice is the delegation of decision making to managerial or other employee discretion, limiting it instead to specific top-down decision rules that themselves result in a discriminatory impact.<sup>39</sup> As discussed in Part I.B,

---

<sup>33</sup> *Id.* at 2535.

<sup>34</sup> *Id.* at 2534.

<sup>35</sup> *Id.* at 2534 n.2 (emphasis added).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See *supra* note 5. See generally, e.g., George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297 (1987) (examining the foundation, development, and plaintiff’s burden of proving disparate treatment).

<sup>39</sup> See, e.g., Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CALIF. L. REV. 1251, 1325–26 (1998); Krieger, *supra* note 19, at 1219; Julia Lamber, *Discretionary Decisionmaking: The Application of Title VII’s Disparate Impact Theory*, 1985 U. ILL. L. REV. 869 *passim* (1985); discussion of the *Dukes v. Wal-mart* cases, *infra* Part II.C.2.

discretionary decisions are exactly those which implicit bias is most likely to impact.

Returning to the disparate treatment cause of action, even if the phrase “because of” is ambiguous, the Congressional goal for this section of Title VII supports a reading in which adverse employment actions that were factually caused by the plaintiffs’ race are prohibited.<sup>40</sup> Plain meaning and congressional intent aside, the Supreme Court in *McDonnell Douglas Corp. v. Green* interpreted Title VII narrowly to require evidence of a purpose to discriminate.<sup>41</sup> As in *Arlington Heights*,<sup>42</sup> in *Price Waterhouse v. Hopkins*, the Court recognized the possibility that more than one factor can motivate an employment decision.<sup>43</sup> Offering a similar response, it held that Title VII creates a right to be free from discriminatory decisions that harm employees and that are “based on a mixture of legitimate and illegitimate considerations.”<sup>44</sup> Even then, however, plaintiffs must show that at least part of the defendant’s “true reason” or “unlawful motive,” that is, the defendant’s purposeful intent, was to discriminate against the plaintiff based on his or her status as a member of a protected class.<sup>45</sup>

In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.<sup>46</sup>

Currently, “[t]he ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.”<sup>47</sup>

---

<sup>40</sup> Girvan & Deason, *supra* note 8, at 1060–61.

<sup>41</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973); *see also* *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 (1977).

<sup>42</sup> *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977).

<sup>43</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989). Later, in the Civil Rights Act of 1991, Congress amended Title VII (but not other, related antidiscrimination statutes) to indicate that prohibited discrimination under Title VII can be a function of one of the employer’s motives rather than just a product of the sole discriminatory motive: “Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin *was a motivating factor* for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. § 2000e-2(m) (2012) (emphasis added).

<sup>44</sup> *Price Waterhouse*, 490 U.S. at 241.

<sup>45</sup> *Id.* at 259 (White, J., concurring).

<sup>46</sup> *Id.* at 250.

<sup>47</sup> *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 153 (2000).

*B. The Psychological Science*

Psychologists who study bias, discrimination, and prejudice generally understand that there are two distinct types of bias—explicit and implicit—each associated with one of two different types of cognitive processing.<sup>48</sup> The first type of processing, generally known as System 1, is efficient, operates extremely quickly, and is automatic, working mostly outside of our conscious awareness.<sup>49</sup> It monitors, decodes, evaluates, interprets, and otherwise tries to make some sense out of the nearly continuous input our brains receive from the environment without us having to pay attention to or make any conscious decisions about it.<sup>50</sup> The second type of cognitive processing, System 2, is what we experience as conscious attention.<sup>51</sup> It is relatively slow and effortful, allowing us to make controlled and deliberate decisions.<sup>52</sup>

*Explicit bias* operates as part of System 2. It is what we typically think of as prejudice: ethnocentrism, racism, and other consciously endorsed attitudes towards or beliefs about people based upon their membership in a socially-defined group.<sup>53</sup> Regular repetition of surveys on nationally representative samples of U.S. adults show that, at least as assessed in self-reported measures,<sup>54</sup> explicit bias has declined substantially since the mid-1900s.<sup>55</sup> Even so, significant racial disparities persisted over the period in a variety of domains, including

---

<sup>48</sup> Jonathan St. B.T. Evans & Keith E. Stanovich, *Dual-Process Theories of Higher Cognition: Advancing the Debate*, 8 PERSP. ON PSYCHOL. SCI. 223, 225 (2013); Eliot R. Smith & Jamie DeCoster, *Dual-Process Models in Social and Cognitive Psychology: Conceptual Integration and Links to Underlying Memory Systems*, 4 PERSONALITY & SOC. PSYCHOL. REV. 108, 108 (2000).

<sup>49</sup> Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449, 1451–52 (2003); see also DANIEL KAHNEMAN, THINKING, FAST AND SLOW 20 (2011).

<sup>50</sup> Kahneman, *Maps of Bounded Rationality*, *supra* note 49, at 1451.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Adam R. Pearson et al., *The Nature of Contemporary Prejudices: Insights from Aversive Racism*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 314, 323–26 (2009).

<sup>54</sup> Girvan, *supra* note 6, at 27–28.

<sup>55</sup> Lawrence D. Bobo et al., *The Real Record on Racial Attitudes*, in SOCIAL TRENDS IN AMERICAN LIFE: FINDINGS FROM THE GENERAL SOCIAL SURVEY SINCE 1972 38, 47 fig.3.1 (Peter V. Marsden ed., 2012); ANDREW M. GREELEY & PAUL B. SHEATSLEY, NAT'L OPINION RES. CTR., U. CHI., ATTITUDES TOWARDS DESEGREGATION 18 tbl.8 (1971), <http://files.eric.ed.gov/fulltext/ED068600.pdf>.

employment,<sup>56</sup> education,<sup>57</sup> home ownership,<sup>58</sup> the accumulation of wealth,<sup>59</sup> placement in foster care,<sup>60</sup> school discipline,<sup>61</sup> and incarceration.<sup>62</sup>

One explanation for the continuing disparities is that they are reinforced and maintained by decisions that are implicitly biased.<sup>63</sup>

---

<sup>56</sup> Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777 *passim* (2009); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 960 (2003); *see also* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 *passim* (2004).

<sup>57</sup> *See* Grace Kao & Jennifer S. Thompson, *Racial and Ethnic Stratification in Educational Achievement and Attainment*, 29 ANN. REV. SOC. 417 *passim* (2003); Jaekyung Lee, *Racial and Ethnic Achievement Gap Trends: Reversing the Progress Toward Equity?*, 31 EDUC. RESEARCHER 3 *passim* (2002).

<sup>58</sup> *See* Kerwin Kofi Charles & Erik Hurst, *The Transition to Home Ownership and the Black-White Wealth Gap*, 84 REV. ECON. & STAT. 281 *passim* (2002).

<sup>59</sup> *See* DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA *passim* (1999); THOMAS SHAPIRO ET AL., INST. ON ASSETS & SOC. POL'Y, THE ROOTS OF THE WIDENING RACIAL WEALTH GAP: EXPLAINING THE BLACK-WHITE ECONOMIC DIVIDE *passim* (2013), <http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf>; Thomas M. Shapiro, *Race, Homeownership and Wealth*, 20 WASH. U. J.L. & POL'Y 53 (2006).

<sup>60</sup> *See* ALICIA SUMMERS ET AL., NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, DISPROPORTIONALITY RATES FOR CHILDREN OF COLOR IN FOSTER CARE: TECHNICAL ASSISTANCE BULLETIN *passim* (2013), <http://www.ncjfcj.org/sites/default/files/Disproportionality%20Rates%20for%20Children%20of%20Color%20in%20Foster%20Care%202013.pdf>; E. Michael Foster et al., *Explaining the Disparity in Placement Instability Among African-American and White Children in Child Welfare: A Blinder-Oaxaca Decomposition*, 33 CHILD. & YOUTH SERVS. REV. 118 *passim* (2011); Fred Wulczyn et al., *Poverty, Social Disadvantage, and the Black/White Placement Gap*, 35 CHILD. & YOUTH SERVS. REV. 65 *passim* (2013).

<sup>61</sup> DANIEL J. LOSEN & RUSSELL J. SKIBA, SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS 2–3 (2010), [http://www.splcenter.org/sites/default/files/downloads/publication/Suspended\\_Education.pdf](http://www.splcenter.org/sites/default/files/downloads/publication/Suspended_Education.pdf); Kent McIntosh et al., *Education Not Incarceration: A Conceptual Model for Reducing Racial and Ethnic Disproportionality in School Discipline*, 5 J. APPLIED RES. ON CHILD.: INFORMING POL'Y FOR CHILD. RISK 1, 2 fig.1 (2014) (relying on data for years 1988–89, 2006–07, and 2011–12 from *Civil Rights Data Collection*, U.S. DEP'T EDUC., OFFICE FOR CIVIL RIGHTS, <http://www.ed.gov/about/offices/list/ocr/data.html?src=rt/> (last visited Dec. 29, 2014); and data for years 1972–73 from CHILD. DEF. FUND, SCHOOL SUSPENSIONS: ARE THEY HELPING CHILDREN? 82 (1975), <http://files.eric.ed.gov/fulltext/ED113797.pdf>).

<sup>62</sup> *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS *passim* (2010); Christopher J. Lyons & Becky Pettit, *Compounded Disadvantage: Race, Incarceration, and Wage Growth*, 58 SOC. PROBS. 257 *passim* (2011).

<sup>63</sup> There are numerous structural explanations for these disparities, which are vitally important to understanding the problem of contemporary racial discrimination and for crafting a solution. *See, e.g.,* Barbara Reskin, *The Race Discrimination System*, 38 ANN. REV. SOC. 17 *passim* (2012). Similarly, there are other psychological alternatives to implicit bias for persistent discrimination. *See* Girvan, *supra* note 6, at 31. To the extent any of these

*Implicit bias* is associated with System 1's efficient, automatic, cognitive processing.<sup>64</sup> Rather than conscious endorsement of beliefs or feelings, it has its roots in generalized associations formed from systematically repetitious or unique and limited experience or exposure.<sup>65</sup> Thus, regularly seeing images of Black but not White criminal offenders on the news may lead even people who value equality to treat a Black individual as if he had a criminal background (or someone White as if he does not).<sup>66</sup> For example, Black civil rights champion Reverend Jesse Jackson once stated, "There is nothing more painful to me at this stage in my life than to walk down the street and hear footsteps and start thinking about robbery—then look around and see somebody white and feel relieved."<sup>67</sup> Moreover, while explicit racial biases have declined, there is evidence that implicit racial biases pervade modern society. For example, in a sample of over 700,000 primarily American participants of all races and ethnicities collected from 2000 to 2006, the responses of over two-thirds, 68%, indicated an implicit attitude favoring Whites over Blacks while approximately one-sixth, 14%, had the opposite response pattern.<sup>68</sup>

---

can be seen as non-purposeful but factual causes of discrimination, the arguments here may generalize to them. Even so, a further description and discussion of structural or other sources of bias is beyond the scope of this Article.

<sup>64</sup> See Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1989); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 19 (1995); Anthony G. Greenwald, *Sensory Feedback Mechanisms in Performance Control: With Special Reference to the Ideo-Motor Mechanism*, 77 PSYCHOL. REV. 73, 73 (1970); David L. Hamilton & Robert K. Gifford, *Illusory Correlation in Interpersonal Perception: A Cognitive Basis of Stereotypic Judgments*, 12 J. EXPERIMENTAL SOC. PSYCHOL. 392, 392 (1976); Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231, 231 (1977); Henri Tajfel, *Cognitive Aspects of Prejudice*, 25 J. SOC. ISSUES 79, 83–86 (1969). Also, a great deal has been written recently about implicit bias for a legal audience. See sources cited *supra* note 6. Accordingly, I will focus only on the key features here.

<sup>65</sup> See SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION: FROM BRAINS TO CULTURE* 328 (Michael Carmichael ed., 2d ed. 2007); Greenwald & Banaji, *supra* note 64, at 5–15.

<sup>66</sup> See Greenwald & Banaji, *supra* note 64, at 5–15.

<sup>67</sup> Bob Herbert, Opinion, *In America; A Sea Change On Crime*, N.Y. TIMES (Dec. 12, 1993), <http://www.nytimes.com/1993/12/12/opinion/in-america-a-sea-change-on-crime.html>.

<sup>68</sup> Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36, 48–51 tbls.4, 5, 6 & 7 (2007).

Finally, there is evidence that implicit bias influences real-world behaviors. For example, in field studies, individuals' levels of implicit bias have been found to predict:

- The tendency for pediatricians to recommend pain medication at lower rates for Black children than White children with identical symptoms;<sup>69</sup>
- Discrimination against Arab-Muslim<sup>70</sup> and obese<sup>71</sup> job applicants in hiring;
- Teachers' expectations for the performance of ethnic minority compared to non-minority children in their classes as well as the actual gap between the non-minority and minority ethnic students on standardized tests;<sup>72</sup>
- The extent to which labor arbitrators decide disputes in favor of women;<sup>73</sup> and
- How much force police officers use when arresting Black children compared to White children.<sup>74</sup>

The fact that there is evidence from each of these studies that people are treated differently than others because of their race, gender, or other characteristic does not mean that the pediatricians, human resource professionals, teachers, arbitrators, or police officers were racist or sexist in the classical understanding of the term. Nor does it mean that it was the purpose of these professionals to discriminate against them. Rather, unlike explicit bias, implicit bias can impact perception, judgment, and decision-making without our conscious knowledge or intent.<sup>75</sup> This phenomenon is particularly true “when a perceiver lacks

---

<sup>69</sup> Janice A. Sabin & Anthony G. Greenwald, *The Influence of Implicit Bias on Treatment Recommendations for 4 Common Pediatric Conditions: Pain, Urinary Tract Infection, Attention Deficit Hyperactivity Disorder, and Asthma*, 102 AM. J. PUB. HEALTH 988, 992–93 fig.1 (2012).

<sup>70</sup> Dan-Olof Rooth, *Automatic Associations and Discrimination in Hiring—Real World Evidence*, 17 LAB. ECON. 523, 524, 529 (2010).

<sup>71</sup> Jens Agerström & Dan-Olof Rooth, *The Role of Automatic Obesity Stereotypes in Real Hiring Discrimination*, 96 J. APPLIED PSYCHOL. 790, 801 (2011).

<sup>72</sup> Linda van den Bergh et al., *The Implicit Prejudiced Attitudes of Teachers: Relations to Teacher Expectations and the Ethnic Achievement Gap*, 47 AM. EDUC. RES. J. 497, 518 (2010).

<sup>73</sup> Erik J. Girvan et al., *The Generalizability of Gender Bias: Testing the Effects of Contextual, Explicit, and Implicit Sexism on Labor Arbitration Decisions*, 39 LAW & HUM. BEHAV. 525 *passim* (2015).

<sup>74</sup> Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 539–40 (2014).

<sup>75</sup> See David M. Amodio, *The Social Neuroscience of Intergroup Relations*, 19 EUR. REV. SOC. PSYCHOL. 1, 10 (2008); Anthony G. Greenwald et al., *Understanding and Using*



the motivation, time, or cognitive capacity to think deeply (and accurately) about others.”<sup>76</sup> Thus, individuals’ implicit biases are more likely to affect their decisions when those decisions must be made quickly or when they are physically or mentally fatigued.<sup>77</sup> Similarly, implicit bias tends to influence decisions that are inherently ambiguous, difficult, or subjective (i.e., those in which people have to exercise their discretion, make a judgment call, or just go with their gut).<sup>78</sup>

Consistent with this, a substantial body of social psychological research suggests that people are most prone to bias when they must draw their own inferences.<sup>79</sup> In a classic demonstration, Dovidio and Gaertner found that, when asked to recommend hiring a job applicant who was represented as either Black or White, participants showed no evidence of racial bias when the information they were given about the candidate suggested that he was either highly or poorly qualified.<sup>80</sup> But when the participants were given ambiguous information showing that the candidate was moderately qualified, participants recommended hiring the White candidate significantly more often than the Black one (76% of the time compared to 45% of the time, respectively).<sup>81</sup>

Legal scholars also have connected ambiguity, subjectivity, and discretion with biased decision-making when discussing the distinction between two forms of legal doctrine: Rules and standards.<sup>82</sup> *Rules* are

---

*the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 17 (2009).

<sup>76</sup> C. Neil Macrae & Galen V. Bodenhausen, *Social Cognition: Thinking Categorically About Others*, 51 ANN. REV. PSYCHOL. 93, 105 (2000); see also FISKE & TAYLOR, *supra* note 65.

<sup>77</sup> Matthew T. Gailliot et al., *Stereotypes and Prejudice in the Blood: Sucrose Drinks Reduce Prejudice and Stereotyping*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 288, 288 (2009) (“[P]eople who have lower levels of blood glucose may be more likely to express prejudice and use stereotypes . . .”).

<sup>78</sup> See John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 PSYCHOL. SCI. 315, 318 (2000) (discussing a study showing bias against Blacks in hiring decisions where the candidate’s qualifications were ambiguous).

<sup>79</sup> Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 257 (2002); Mary E. Wheeler & Susan T. Fiske, *Controlling Racial Prejudice: Social-Cognitive Goals Affect Amygdala and Stereotype Activation*, 16 PSYCHOL. REV. 56, 56 (2005); see also William T. Hoyt & Michael-David Kerns, *Magnitude and Moderators of Bias in Observer Ratings: A Meta-analysis*, 4 PSYCHOL. METHODS 403, 403 (1999).

<sup>80</sup> Dovidio & Gaertner, *supra* note 78, at 318.

<sup>81</sup> *Id.* at 317.

<sup>82</sup> Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L.

inflexible and determinative in the sense that they “attempt to specify outcomes before particular cases arise,” leaving little or no room for discretion or interpretation.<sup>83</sup> *Standards*, by comparison, are flexible and indeterminate in that, in order to make a decision, the person applying the doctrine must figure out what it means in the context of the facts of a particular situation.<sup>84</sup> A speed limit of fifty-five miles per hour and formulaic sentencing guidelines are examples of rules. Statutes specifying that drivers must proceed at a speed that is reasonable and cautious for existing conditions and discretionary departures from sentencing guidelines are examples of standards.

When a rule governs a given situation, application is straightforward and the correct outcome is generally constrained and highly predictable. As a result, rules are thought to reduce or eliminate errors in judgment, including those caused by biases:<sup>85</sup>

[Rules] can also counteract something worse: bias, favoritism, or discrimination in the minds of people who decide particular cases. In this way, rules are associated with impartiality, a notion which is captured in the idea that Justice, the goddess, is “blindfolded.” Rules are blind to many features of a case that might otherwise be relevant, and that are relevant in some social contexts, or to many things on whose relevance people have great difficulty in agreeing—religion, social class, good or bad looks, height, and so forth.<sup>86</sup>

A rule’s ability to restrain individual-level bias, however, is thought to come at the cost of imprecision in outcome. With standards, decision-makers can tailor the outcome to idiosyncratic features of a situation. However, the discretion necessary to do so is what leaves room for bias-prone interpretations.<sup>87</sup>

Returning to the speed-limit example, in its report on the Ferguson Police Department (FPD), U.S. Department of Justice indicated that it found that Black drivers accounted for 80% of citations for speeding when officers relied upon their own visual assessments but only 72%

---

REV. 1685, 1701 (1976); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 961 (1995).

<sup>83</sup> Sunstein, *supra* note 82, at 961.

<sup>84</sup> *Id.* at 965.

<sup>85</sup> Kennedy, *supra* note 82, at 1706; Sunstein, *supra* note 82, at 974.

<sup>86</sup> Sunstein, *supra* note 82, at 974. For an in-depth examination of justice iconography and the evolution of adjudication, see JUDITH RESNIK & DENNIS CURTIS, *REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS* (2011).

<sup>87</sup> Kennedy, *supra* note 82, at 1706; Sunstein, *supra* note 82, at 974.

of speeding citations when a laser or radar gun was used.<sup>88</sup> Black people make up 67% of the population of Ferguson, Missouri.<sup>89</sup> Assuming that they make up the same proportion of drivers, the odds of a Black versus non-Black driver getting a speeding ticket is 1.11 times larger when police officers must use their judgment and draw their own inferences about who is speeding as compared to when they rely upon an objective measure of the car's speed. The statistically significant discrepancy is modest in magnitude, but was nevertheless viewed by the Department of Justice as practically significant in light of the high number of incidents involved and the potential real-life repercussions of a citation for speeding.<sup>90</sup>

Taken together, the convergent results of lab and field research on bias, as well as the psychological and jurisprudential theory regarding when it is most likely to occur, provide strong support for the role of discretion, not intent, in causing harm from discrimination. Legal doctrine, however, does not reflect this insight. Part II of this Article examines two possible explanations for the initiation and continuation of this gap—lack of knowledge and remedies considerations—and argues that the latter of the two is most significant.

## II

### UNDERSTANDING THE ANTIDISCRIMINATION LAW-SCIENCE GAP IN ORDER TO CLOSE IT

Behavioral realism is a prescriptive approach to legal analysis based upon the observation that judges regularly make assumptions about human behavior when creating and modifying legal doctrine.<sup>91</sup> When they do so and the assumptions are the subject of social scientific research, then judges ought to have the affirmative responsibility to either look to the relevant scientific evidence and conform the doctrine to it or explicitly justify why the law should differ from the science. In

---

<sup>88</sup> U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 66 (2015), [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

<sup>89</sup> *Id.* at 67.

<sup>90</sup> *Id.* (“These disparities mean that African Americans in Ferguson bear the overwhelming burden of FPD’s pattern of unlawful stops, searches, and arrests with respect to these highly discretionary ordinances.”).

<sup>91</sup> See Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1001 (2006).

the words of Linda Krieger and Susan Fiske in their article describing the approach and its application to antidiscrimination law:

Behavioral realism, like naturalism, stands for the proposition that judges should not generate the behavioral theories sometimes used in the construction or justification of legal doctrine through a solely conceptual, *a priori* process. To the extent that legal doctrines rely on stated or unstated theories about the nature of real world phenomena, behavioral realism argues, those theories should remain consistent with advances in relevant fields of empirical inquiry. And where the real world phenomena relevant to a particular area of law concern human social perception, motivation, and judgment, the relevant domains of empirical inquiry with which legal theories should remain consistent include cognitive social psychology and the related social sciences.<sup>92</sup>

If, consistent with the insights underlying the scientific method and naturalistic philosophy, it is possible to know how the world works, then having and acting on that knowledge will produce more predictable results than proceeding in ignorance of it.<sup>93</sup> To the extent legal doctrine targeting discrimination incorporates accurate models “of what discrimination is, what causes it to occur, how it can be prevented, and how its presence or absence can best be discerned in particular cases,” the doctrine is more likely to be able to achieve its intended purpose.<sup>94</sup> The failure to incorporate social scientific understanding into law is particularly problematic in a legal system that values just and reasonable, or at least not arbitrary, inconsistent, or hypocritical, results.<sup>95</sup> As such, failures to reconcile the two must be exposed, changed, and justified or admonished as covert departures from stated public policy.

Asserting that the law-science gap in antidiscrimination doctrine ought to be closed as a jurisprudential matter is different than

---

<sup>92</sup> *Id.* See generally Brian Leiter, *Naturalism and Naturalized Jurisprudence*, in ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY 79 (Brian Bix ed., 1998) (describing naturalism); Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491 (2001) (identifying recent developments in epistemology and its application to the rules of evidence); Mitu Gulati & Laura Beth Nielsen, *Introduction: A New Legal Realist Perspective on Employment Discrimination*, 31 LAW & SOC. INQUIRY 797 (2006) (focusing legal realism on employment discrimination suits); Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008) (describing legal realism).

<sup>93</sup> Girvan & Deason, *supra* note 8, at 1065–67.

<sup>94</sup> Krieger & Fiske, *supra* note 91, at 1001.

<sup>95</sup> Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CAL. L. REV. 1063, 1065 (2006).

identifying how it might actually be closed in practice.<sup>96</sup> The former is policy. The latter is pragmatic, requiring an accurate understanding of what caused the gap to form and why it persists. There are numerous possible explanations to consider, each of which likely operates to some extent.<sup>97</sup> Part II compares two of these explanations: (1) that it reflects judges' lack of knowledge of the relevant psychological science and associated evidence of injury, and (2) that it reflects a judicial concern about what could, as a practical matter, be done to remedy implicit bias and other unintentional forms of discrimination.<sup>98</sup> The Article then shows that remedies concerns play a substantial role in the evolution of antidiscrimination doctrine in two areas involving discretion: the death penalty and employment decisions.

### A. Judicial Ignorance of Psychological Science

The existence and persistence of the law-science gap in antidiscrimination doctrine is often attributed to a lack of judicial knowledge of the psychological science of implicit bias.<sup>99</sup> For example, scholars have described judges who interpret antidiscrimination doctrine in ways that prohibit only purposeful

---

<sup>96</sup> Girvan, *supra* note 6, at 79; Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 503 (2010) (observing that “[o]f course, everything we have written may be politically naive,” and discussing three categories of “cultural, social, and political forces” objections to the acceptance of the science of implicit bias); *see also* Jerry Kang, *Implicit Bias and the Pushback from the Left*, 54 ST. LOUIS U. L.J. 1139, 1146 (2010) (considering that, although science and evidence-based counts of discrimination theoretically have extra persuasive power and are somewhat privileged in policymaking, they still can be denied by those with ideological motivations to do so).

<sup>97</sup> Girvan, *supra* note 6, at 70–71. For example, there are problems with using generalized social science to infer facts in particular cases, limits on the judicial role and expertise in policymaking, concerns of judicial economy, judicial ideology, and problems related to remedies. *Id.*

<sup>98</sup> Other sources cited in this Article discuss structural and sociological sources of discrimination. While the argument here focuses on the law-science gap related to research on implicit bias, the idea that remedies concerns are a substantial barrier to advancing antidiscrimination law applies equally to other, non-purposeful sources of injury from racial discrepancies.

<sup>99</sup> Other explanations are also recognized. Krieger & Fiske, *supra* note 91, at 998 (attributing the gap to differences in the goals and sources of legitimacy of the legal system (conclusively resolve particular disputes, stability, and predictability) and sciences (continuously advance knowledge, rigorous testing, and evolution)); *see also* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 600 (1993) (“I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its ‘falsifiability,’ and I suspect some of them will be, too.”); Girvan, *supra* note 6, at 37–38.

discrimination as “ignoring” or “blind to unconscious bias”<sup>100</sup> and their failure to update the doctrine attributable to a mistaken belief that “discrimination is ‘easy to identify.’”<sup>101</sup> Similarly, antidiscrimination doctrine itself is described as having been developed “in ignorance of [implicit social cognition] generally and implicit bias specifically”<sup>102</sup> and to “typically reflect common sense based on naive psychological theories.”<sup>103</sup> It is thought that judicial use of “intuitive” or “lay” psychology, rather than empirically supported theory, is understandable in this context, as this is what we all regularly use our own anecdotal experience to do:

[J]udges, like most people, take for granted certain assumptions about how people behave and what motivates them. These assumptions seem self-evidently correct, even when they are wrong. For this reason, judges sometimes incorporate empirically testable social science claims into their legal reasoning without even noticing that they are doing so.<sup>104</sup>

For the reasons articulated by the behavioral realists, however, use of lay theories that are less accurate than, or even entirely inconsistent with, models of human behavior grounded in more recent social science is unjustified.<sup>105</sup> If the antidiscrimination law-science gap is caused primarily by a lack of judicial knowledge, then the solution to it should be to inform judges of research supporting the psychological science of implicit bias and evidence of its applicability to the cases they are deciding.

---

<sup>100</sup> Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 173 (2005).

<sup>101</sup> *Id.* at 173 n.83 (“Any acceptance of unconscious bias, however, has not (yet) affected the *Batson* procedure’s focus on the striking attorney’s discriminatory intent. One reason for this may be that the Court still believes discrimination is ‘easy to identify.’”) (citing Sheri L. Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 67 (1993)).

<sup>102</sup> Kang & Banaji, *supra* note 95, at 1078.

<sup>103</sup> Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3. ANN. REV. L. & SOC. SCI. 427, 440 (2007).

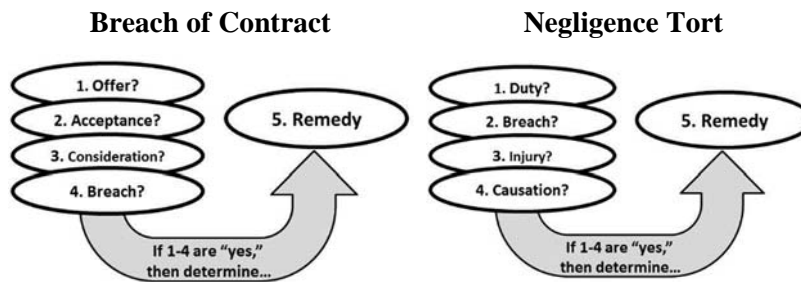
<sup>104</sup> Krieger & Fiske, *supra* note 91, at 1002.

<sup>105</sup> *See* Kang & Banaji, *supra* note 95, at 1079 (“A model that supposes that discrimination takes place explicitly, through a rational cost-benefit analysis or other expression of explicitly held views has become woefully out-of-date.”). *See generally* BEYOND COMMON SENSE, PSYCHOLOGICAL SCIENCE IN THE COURTROOM (Eugene Borgida & Susan T. Fiske eds., 2007) (collecting topics on which psychology yields non-intuitive, legally relevant insights).

*B. Absence of Acceptable Remedies*

An alternative explanation for the existence and persistence of the antidiscrimination law-science gap is a concern about remedies. The conventional, formal approach to legal thought, analysis, and decision-making is rights-and-duties focused.<sup>106</sup> In it, adjudication proceeds as an examination of whether the plaintiff has proven facts that satisfy the elements necessary to state a valid claim. If the plaintiff has done so, and the defendant has no valid defense, then the court will issue judgment for the plaintiff and order that the defendant provide the applicable remedy. Figure 1 illustrates this general approach for a claim of breach of contract and negligence actions.

Figure 1:



Under the conventional, rights-and-duties-centered approach, the remedy (i.e., what the court actually does for “a litigant who has been wronged or is about to be wronged”<sup>107</sup>), is treated as an almost procedural afterthought. Further, those remedies are generally viewed as something that follows naturally from an injury and substantive right to relief. In the words of Blackstone, it is “a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.”<sup>108</sup> As the instrumental end of litigation, however, remedies, and limitations on which and whether they are available, can very effectively diminish the scope of a substantive right, or extinguish it altogether.

A classic example of a court imposing a remedial limitation on a substantive right in contract law is the case of *Peevyhouse v. Garland*

<sup>106</sup> Michael Coenen, *Spillover Across Remedies*, 98 MINN. L. REV. 1211, 1212 (2014).

<sup>107</sup> DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 1 (4th ed. 2012).

<sup>108</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*23.

*Coal and Mining Co.*<sup>109</sup> There, as recounted in the judicial opinion, a farm family leased a portion of its property to a mining company for use as a strip mine (i.e., one in which minerals are extracted by digging large pits on the surface rather than through subterranean mine shafts).<sup>110</sup> As an expressly negotiated condition of the lease, the company agreed to restore the property after the mining was complete.<sup>111</sup> When it later refused to do so, the plaintiffs sued for breach of contract claiming as damages the approximate costs of the agreed upon remediation: \$25,000.<sup>112</sup> In the case, the parties effectively stipulated to the fact that all of the elements necessary for an enforceable contract were present and that the company violated its substantive duty by breaching the lease.<sup>113</sup> But the company claimed that the appropriate measure of the injury, and thus the amount the plaintiffs could recover, was the diminution in the market value of the property: \$300.<sup>114</sup> At trial, the jury awarded an amount between these<sup>115</sup> and, on appeal, the Oklahoma Supreme Court agreed with the defendant.<sup>116</sup>

Defining the remediation provision in the lease as “merely incidental to the main purpose in view,” it held that “where the economic benefit which would result to lessor by full performance of the work is grossly disproportionate to the cost of performance, the damages which lessor may recover are limited to the diminution in value resulting to the premises because of the non-performance.”<sup>117</sup>

Thus, under the doctrine established by the court, there is a legally recognized right to recover for injury from the breach of a valid lease in these circumstances and the remediation provision is enforceable. However, that substantive right does not include the right to recover the actual injury in terms of specific performance or its equivalent cost, only the much lower value of economic harm measured in terms of the

---

<sup>109</sup> *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109, 114 (Okla. 1962).

<sup>110</sup> *Id.* at 111.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 112.

<sup>115</sup> *Id.* at 111 (“[The jury] returned a verdict for plaintiffs for \$5000.00—only a fraction of the ‘cost of performance’, [sic] *but more than the total value of the farm even after the remedial work is done.*”).

<sup>116</sup> *Id.* at 114.

<sup>117</sup> *Id.* at 114. For an in-depth look at the case, see Judith L. Maute, *Peevyhouse v. Garland Coal & Mining Co. Revisited: The Ballad of Willie and Lucille*, 89 NW. U. L. REV. 1341 (1995).



change in resale value of the property.<sup>118</sup> The difference is akin to *damnum absque injuria* (i.e., harm for which there is no legal recovery) as there is no right, in any meaningful sense, to state a claim for relief for it.<sup>119</sup>

Some limits that courts place on remedies after finding that the defendant violated the plaintiff's substantive rights are necessary as a practical matter. The fictions of economics aside, it is impossible to place an accurate value on certain categories of injuries, such as a life itself,<sup>120</sup> or otherwise fully restore plaintiffs to the condition they would have been in absent the defendants' harmful acts:

Because the wrongdoer's substantive violation has changed the victim's world for the worse, students of Remedies share . . . "a special awareness of the ironic incongruities between moral purpose and pragmatic result." If Remedies is a science, it is a science of choice between responsible solutions in a world of limited possibilities.<sup>121</sup>

Judges, thus, may work hard to do their best while recognizing that there is ultimately no salve for the particular injury a plaintiff suffered that will remove his or her scars.

Other limitations imposed on remedies after liability is determined represent public policy tradeoffs designed to increase or attenuate the impact of certain substantive rights on defendants. A familiar legislative example is the 1991 Amendments to Title VII, which made limited compensatory and punitive damages available for plaintiffs in disparate treatment cases (i.e., those that require a showing of purposeful discrimination) but not plaintiffs in disparate impact cases (i.e., those in which showing the discriminatory impact of an employment practice can, in theory, substitute for evidence of intent).<sup>122</sup> Judges, however, use remedies to satisfy similar public policy considerations in response to the cumulative efforts of plaintiffs'

---

<sup>118</sup> See *Peevyhouse*, 382 P.2d at 114.

<sup>119</sup> *Nally v. Grace Cmty. Church of the Valley*, 763 P.2d 948, 956 (1988) (quoting 5 WITKIN, SUMMARY OF CALIFORNIA LAW: TORTS § 6 (10th ed. 1988)); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 984–85 (1982); see also 1 STEIN ON PERSONAL INJURY DAMAGES TREATISE § 1:1 (3d ed. 2015) ("[T]here can be 'damage without injury' in those instances in which the loss or harm was not the result of a violation of a legal duty. These situations are often described with the Latin phrase 'damnum absque injuria.'").

<sup>120</sup> *Turpin v. Sortini*, 643 P.2d 954, 962 (Cal. 1982).

<sup>121</sup> Doug Rendleman, *Remedies-The Law School Course*, 39 BRANDEIS L.J. 535, 535 (2001) (citation omitted).

<sup>122</sup> 42 U.S.C. § 2005e-5(g) (2012).

and defendants' attorneys, who use the issue of remedies as an opportunity to take a second bite at the apple and protect their respective clients' interests. Or, in the words of Judge Easterbrook: "Remedies are designed to track entitlements, to give people their due. When we hear an objection to the remedy, it is almost always a disguised objection to the definition of what is due, and not to the methods used to apply the balm."<sup>123</sup>

*Peevyhouse*, as it is commonly taught and understood, is arguably such a case.<sup>124</sup> Although the plaintiffs won on the substantive legal issue of contract breach, the court determined that the plaintiffs' substantive right did not entitle them to more than the difference in the market value of their property.<sup>125</sup> Other classic examples include that consequential damages are not generally recoverable when defendants breach a duty defined by contract, such as delaying delivery of a mill shaft,<sup>126</sup> but are recoverable when defendants breach a duty defined by tort law, such as negligently securing a ship to a pier.<sup>127</sup> Each involves a court finding that the defendant violated the plaintiff's substantive rights. They differ only in the nature and scope of remedy that the court finds is appropriate and available for the violation.

The practical limitations on remedies for injuries that cannot be reliably measured or meaningfully redressed and lawyers'—or lobbyists'—use of remedies to advance their clients' interests are consistent with the conventional approach to legal thought in which substantive rights are primary to and temporally proceed remedies analysis. Often, however, the order is reversed and the remedies are the tail that wags the substantive dog. In these instances, courts alter the scope of the substantive rights, or refuse to recognize or enforce them altogether, because the remedies that would accompany such a right are seen as impossible, impracticable, or otherwise undesirable or unacceptable as a matter of public policy.<sup>128</sup> Figure 2 illustrates this remedies-centered approach in breach of contract and torts actions.

---

<sup>123</sup> Frank H. Easterbrook, *Civil Rights and Remedies*, 14 HARV. J.L. & PUB. POL'Y 103, 103 (1991).

<sup>124</sup> Maute, *supra* note 117, at 1428.

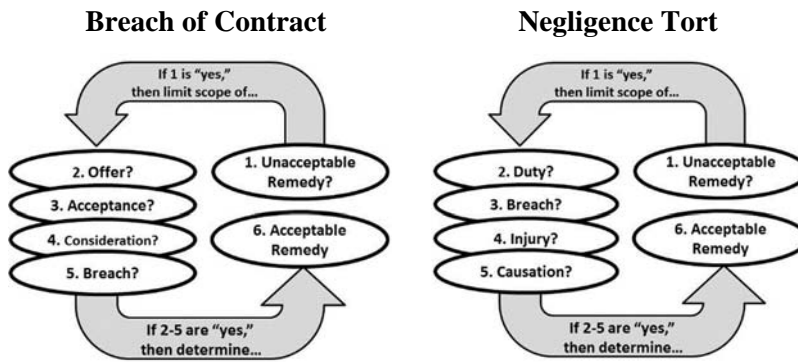
<sup>125</sup> *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109, 114 (Okla. 1962).

<sup>126</sup> *Hadley v. Baxendale* (1854) 156 Eng. Rep. 145, 151.

<sup>127</sup> *Petition of Kinsman Transit Co.*, 338 F.2d 708, 722 (2d Cir. 1964).

<sup>128</sup> Coenen, *supra* note 106, at 1213–14; Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 738 (1992); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 89–90 (1999); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 857 (1999).

Figure 2:



The Hand formula<sup>129</sup> for determining what constitutes reasonable care—and thus not negligence—is a theoretical example of a remedies-centered prescriptive principle. The formula states that defendants’ duty of care exists only to the extent that the costs of the precautions necessary to avoid injuring plaintiffs (i.e., the burden on the defendants, B) are less than the expected value of the injuries that would likely result from the failure to take those precautions (i.e., the severity of the injury or loss to the plaintiffs, L, times the probability of the injuries, P):  $B < PL$ .<sup>130</sup> Viewed through the remedies lens, the formula is an assertion that a court ought to deny plaintiffs a substantive right to relief when the cost of preventing the injury or undoing it (e.g., specific performance or another type of injunction) would be greater than the substitutionary sum (i.e., the remedy) that the defendants will likely pay potential plaintiffs in compensation for their injuries. It reverses the conventional approach because it suggests that public policy concerns related to how much defendants would have to pay if

<sup>129</sup> *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (“Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner’s duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL.”). For one of numerous discussions of the formula, see Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015 (1994).

<sup>130</sup> WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 85 (1987).

plaintiffs have a substantive right should narrow the scope of the substantive rights themselves.

There are several areas of law in which remedies considerations overtly impact whether and the extent to which courts recognize substantive rights. Among the more overt of these is the issue of redressability as a threshold to federal jurisdiction.<sup>131</sup> In terms of legal taxonomy, redressability is located within the doctrine of standing.<sup>132</sup> Article III of the U.S. Constitution restricts the jurisdiction of federal courts to “cases” and “controversies.”<sup>133</sup> This provision was designed to limit the power of the judicial branch by prohibiting it from issuing advisory opinions (i.e., opinions that are not related to a particular dispute that has been brought to the court for resolution, as these would be, in effect, legislation). Relying upon this language, the U.S. Supreme Court has held that plaintiffs do not have access to the courts to vindicate their substantive rights unless they can show an injury that is “concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.”<sup>134</sup>

Focusing on the last element of this analysis, an injury is not redressable if there is not a “substantial likelihood” that the remedy the plaintiff seeks from the court would alleviate or compensate the plaintiff for the complained of injury.<sup>135</sup> To illustrate, in *Linda R.S. v. Richard D.*, the plaintiff, a mother of a child born out of wedlock, was seeking to obtain child support through an injunction forcing the state to prosecute the child’s father criminally for failure to pay.<sup>136</sup> After recognizing that she “does have an interest in the support of her child,”<sup>137</sup> the Court found that it would not hear the case because incarcerating the father would not necessarily lead to the mother getting child support: “Thus, if appellant were granted the requested relief, it would result only in the jailing of the child’s father. The prospect that

---

<sup>131</sup> Harold J. Krent, Laidlaw: *Redressing the Law of Redressability*, 12 DUKE ENVTL. L. & POL’Y F. 85, 86 (2001).

<sup>132</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 570–71 (1992) (“The short of the matter is that . . . any relief the District Court could have provided in this suit . . . was not likely to [redress the injury]. . . . There is no standing.”).

<sup>133</sup> U.S. CONST. art. III, § 2.

<sup>134</sup> *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)).

<sup>135</sup> *Mayfield v. United States*, 599 F.3d 964, 971 (9th Cir. 2010) (citing *Johnson v. Stuart*, 702 F.2d 193, 196 (9th Cir. 1983)); see also *Lujan*, 504 U.S. at 606 (Blackmun, J., dissenting).

<sup>136</sup> *Linda R.S. v. Richard D.*, 410 U.S. 614, 614–15 (1973).

<sup>137</sup> *Id.* at 619.

prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative.”<sup>138</sup>

State courts engage in a similar jurisdictional analysis under the doctrine of “mootness” or “justiciability.” Mirroring the elements of standing, under the doctrine, courts will dismiss cases unless there is “an actual controversy between or among the parties to the dispute,” the parties’ interests are “adverse,” “the matter in controversy” is “capable of being adjudicated by judicial power,” and “*the determination of the controversy will result in practical relief to the complainant.*”<sup>139</sup> Thus, in *Adziovski v. Elezovski*, the Connecticut Court of Appeals dismissed a case as moot where the relevant parties had moved to Macedonia, making it all but impossible for the district court to proceed.<sup>140</sup>

The majority opinions in cases rejecting plaintiffs’ substantive claims for failing the redressability element of standing or practical relief requirement of mootness cast the decision as a necessary and inevitable outcome rather than a reflection of public policy debates. The dissenting opinions, however, make clear that the justices and judges themselves differ substantially as to whether it was necessary for the court to deny the plaintiffs’ rights. In *Lujan v. Defenders of Wildlife*, for example, the dissent described the limitation imposed by the Court, including redressability, as “what amounts to a slash-and-burn expedition through the law of environmental standing,”<sup>141</sup> in which it could not join because “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”<sup>142</sup>

---

<sup>138</sup> *Id.* at 618.

<sup>139</sup> *Adziovski v. Elezovski*, 985 A.2d 345, 347 (Conn. App. Ct. 2009).

<sup>140</sup> *Id.* at 347 (“[I]t is exceedingly unlikely that the trial court could further entertain the matter because neither party can reasonably be made available to appear in court to pursue their respective claims on remand.”).

<sup>141</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 606 (Blackmun, J., dissenting).

<sup>142</sup> *Id.* (alteration in original) (quoting *Marbury v. Madison*, 5 U.S. 137, 163 (1803); *see also* *Ashcroft v. Iqbal*, 556 U.S. 662, 694 (2009) (Souter, J., dissenting) (criticizing the majority opinion for increasing pleading standards and heightening the burden for Bivens claim); *Lieberman v. Univ. of Chicago*, 660 F.2d 1185, 1195 (7th Cir. 1981) (Swygert, S.J., dissenting) (dissent from ruling that damages were unavailable to plaintiff under Title IX for alleged sex discrimination); Laurence H. Tribe, *Death By A Thousand Cuts: Constitutional Wrongs Without Remedies After Wilkie v. Robbins*, 2007 CATO SUP. CT. REV. 23, 70 (2007) (discussing limitations on Bivens claims that have resulted in inadequate remedies).

Beyond overt use by the courts to limit jurisdiction, scholars employing the remedies perspective have identified several other doctrinal areas in which courts appear to be covertly restricting substantive rights to accommodate concerns about what remedy would otherwise follow from them. Examples include judges limiting the scope of Fourteenth Amendment protections against unreasonable search and seizure in order to avoid applying the exclusionary rule,<sup>143</sup> restricting the definition of what constitutes a human rights violation in order to avoid the “collateral costs” implicated in imposing an “effective remedy” for such violations,<sup>144</sup> and increasing the threshold requirement of prejudice under the harmless error doctrine to avoid reversing convictions even when substantive rights were infringed.<sup>145</sup>

Adopting this perspective, it is possible that judges are well aware of social scientific theory and evidence showing that non-purposeful discrimination occurs and is a cause, in fact, of systematic injury to members of protected classes like racial minorities. The judges may, however, be concerned about the remedies implications of recognizing a substantive right to be free from such discrimination. Indeed, if non-purposeful discrimination is pervasive and there are no validated interventions that can prevent it,—or those that are available are so onerous as to be impractical—then won’t the court end up finding everyone liable for continuing violations that neither money damages nor injunctive relief can reliably stop? As a result, judges may interpret substantive antidiscrimination doctrine in a way that addresses some harm but avoids what they might regard as the most significant practical remedies problems.

---

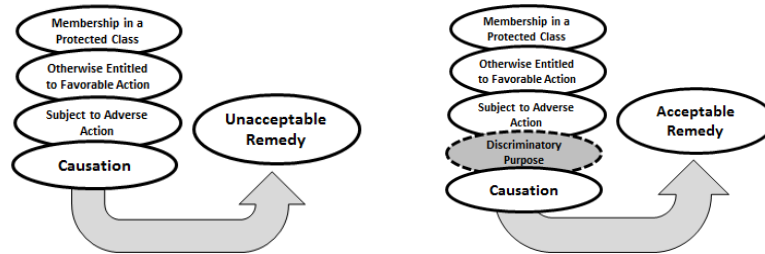
<sup>143</sup> Coenen, *supra* note 106, at 1266–67.

<sup>144</sup> Sonja B. Starr, *Rethinking “Effective Remedies”: Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 693 (2008); *see also* Jennifer E. Laurin, *Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1007 (2010); Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 421–75 (2012).

<sup>145</sup> Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 71 (2002).

Figure 3 illustrates this explanation.

Figure 3



The remedies perspective thus offers an alternative explanation to judicial ignorance for the existence and persistence of an antidiscrimination law-science gap, and one with very different implications. If the gap is caused by a lack of knowledge, then efforts at closing the gap should be focused on educating judges about the relevant psychological science and proffering evidence of its applicability to the cases before them. However, if the gap is attributable to a judicial perception that there are no acceptable remedies for certain types of discrimination, then the focus should be on developing or emphasizing available practical interventions and deemphasizing the judicial or social costs of implementing them.

### C. Two Antidiscrimination Law Case Studies

Does judicial ignorance of the relevant social scientific theory and associated evidence of harm or remedies concerns better explain the law-science gap? To answer this question, this Part reviews major developments in two doctrinal areas related to discretionary decisions that result in discriminatory outcomes: the death penalty and use of discretionary criteria in employment decisions. If the antidiscrimination law-science gap is caused primarily by a lack of judicial knowledge, then we would expect to see that judges who are presented with the relevant social science and strong evidence of injury from non-purposeful discrimination to recognize a substantive right to be free from it. As the following examples illustrate, however, social scientific theory and statistical evidence may sometimes have that effect but, ultimately, providing such information has not been a successful strategy. In defining the scope of substantive rights to be free from discrimination in the context of the death penalty and hiring and promotion decisions, the U.S. Supreme Court has, at various

points, recognized the relevant social science and associated evidence of injury. But in each area, when they were later presented with more sophisticated research and evidence of injury, they checked or restricted the rights rather than advancing them. As these latter doctrinal changes are often accompanied by more and more rigorous social scientific information, they are inconsistent with the judicial ignorance explanation. They are, however, consistent with efforts by the Court to balance and adjust substantive rights in response to concerns about the availability, acceptability, and costs of remedies for non-purposeful discrimination.

### *1. The Death Penalty*

In 1972, the U.S. Supreme Court held by a bare majority that imposition of the death penalty is unconstitutional under the Eighth Amendment when it is imposed at the almost complete discretion of the judge or jury.<sup>146</sup> The case, *Furman v. Georgia*, involved the consolidated appeal of three capital sentences, one for murder, two for rape.<sup>147</sup> In their concurrences and dissents the members of the Court debated the issue of whether the prohibition on “cruel and unusual punishment” was limited to especially “barbaric” forms of torture, or if it also encompassed the arbitrary or inconsistent imposition of the death penalty.<sup>148</sup> For the dissenting justices, perhaps the most significant factor was that, going back as far as anyone might care to look, death has unquestionably been an acceptable form of criminal punishment, and often one that was used quite liberally.<sup>149</sup> Indeed, relying in large part on this history, just the year before, in *McGautha v. California*, the same Court held that state laws that placed the decision to impose the death penalty in capital cases in “the untrammelled discretion of the jury” did *not* violate the Equal Protection Clause of the Fourteenth Amendment.<sup>150</sup>

The *McGautha* opinion, however, did not contain a discussion of race, gender, or class bias in the implementation of the death penalty.

---

<sup>146</sup> *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972).

<sup>147</sup> *Id.* at 239.

<sup>148</sup> *Id.* at 244–45.

<sup>149</sup> *Id.* at 382 (Burger, J., dissenting). *See generally* DOUGLAS HAY ET AL., *ALBION’S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* (2011) (depicting, through a series of essays, the English criminal justice system and brutal punishments at the time the U.S. Constitution was written).

<sup>150</sup> *McGautha v. California*, 402 U.S. 183, 207 (1971), *reh’g granted, judgment vacated sub nom.* *Crampton v. Ohio*, 408 U.S. 941 (1972).



Nor did the justices appear to consider the role that discretion might play in facilitating such bias. By the time they decided *Furman*, at least three of the justices had come to understand a system in which jurors or a judge have complete discretion to select which of a subset of those convicted of committing capital offenses are sentenced to death as producing unconstitutional racial discrimination.<sup>151</sup> Having just decided that discretion did not violate the Fourteenth Amendment, however, they shoehorned their equal protection concerns into an Eighth Amendment analysis.

Justice Marshall, for example, asserted that a punishment could be cruel and unusual, and thus in violation of the Eighth Amendment, if it “is abhorrent to currently existing moral values.”<sup>152</sup> Among these values is racial equality. Arguing that the Court’s endorsement of discretion in *McGautha* was “an open invitation to discrimination,” he then reviewed empirical evidence for racial and gender bias in administration of the death penalty from 1930 until 1968.<sup>153</sup> Figure 4 summarizes the racial disparities.<sup>154</sup>

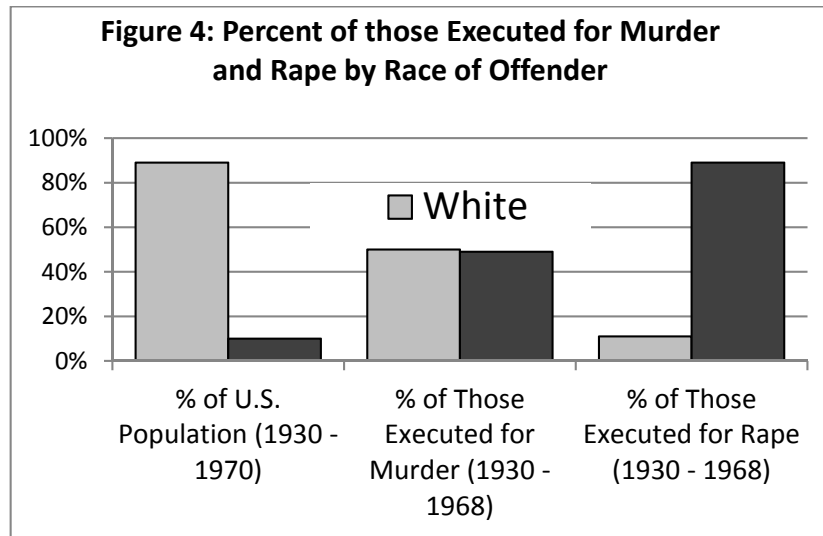
---

<sup>151</sup> *Furman*, 408 U.S. at 256–57 (Douglas, J., concurring); *id.* at 309 (Stewart, J., concurring); *id.* at 364 (Marshall, J., concurring).

<sup>152</sup> *Id.* at 333 (Marshall, J., concurring).

<sup>153</sup> *Id.* at 365.

<sup>154</sup> *Id.*; Campbell Gibson and Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for Large Cities and Other Urban Places in the United States* (U.S. Census Bureau, Population Div., Working Paper No. 76, 2005), <https://www.census.gov/population/www/documentation/twps0076/twps0076.pdf>.



Using the proportion of Blacks and Whites in the U.S. population during this period as a reference, a basic analysis of the data shows that, overall, Blacks were approximately nine times as likely to be executed for murder and seventy-two times as likely to be executed for rape as Whites. Justice Marshall also observed that only about 1% of the people executed are women.<sup>155</sup>

For his part, Justice Douglas argued more directly that discriminatory application of the death penalty was itself “unusual” and thus a violation of the Eighth Amendment: “It would seem to be incontestable that the death penalty inflicted on one defendant is ‘unusual’ if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.”<sup>156</sup>

Along with historical and anecdotal evidence, supporting his assertion that the death penalty violated the Eighth Amendment, Justice Douglas considered an empirical study of the outcomes of capital cases in Texas from 1924 to 1968.<sup>157</sup> Overall, the results of the study suggested that Black defendants, as well as the “poor, young, and ignorant,” were more likely to receive the death penalty.<sup>158</sup> With respect to race in particular, among capital offenders, 88.4% of Blacks

<sup>155</sup> *Furman*, 408 U.S. at 365 (Marshall, J., concurring).

<sup>156</sup> *Id.* at 242 (Douglas, J., concurring).

<sup>157</sup> *Id.* at 250.

<sup>158</sup> *Id.*

were executed compared to only 79.8% of Whites,<sup>159</sup> rates that suggested that Black offenders who were convicted of a capital offense were 1.11 times more at risk of receiving the death penalty than White offenders. Likening this outcome to the caste system in India, under which the Brahman were historically exempt from capital punishment,<sup>160</sup> and the *de facto* operation of hypothetical laws shielding the wealthy from the death penalty or providing that only Blacks, the poor, or uneducated should be subject to it, Justice Douglas concluded that: “[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments.”<sup>161</sup>

Finally, anchoring his Eighth Amendment analysis on evidence of the infrequent use of the death penalty, Justice Stewart asserted that the death sentences at issue “are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”<sup>162</sup> Against this background, although “racial discrimination has not been proved,” he agreed that it did appear that “if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.”<sup>163</sup>

In the decade following *Furman*, death penalty jurisprudence evolved rapidly as states enacted revised statutes designed to address the Court’s concerns.<sup>164</sup> Racial bias and discrimination in the administration of the death penalty are again not generally discussed in these opinions. Even so, the outcomes suggest that the Court was focused on constructing a constitutional doctrine that would protect defendants in the situations in which the social science presented in *Furman* indicated they were most likely to be vulnerable to racial bias: death penalty decisions made with unguided discretion generally and capital cases involving rape in particular. For example, four years after

---

<sup>159</sup> *Id.* at 250 n.15.

<sup>160</sup> *Id.* at 255.

<sup>161</sup> *Id.* at 256–57.

<sup>162</sup> *Id.* at 309 (Stewart, J., concurring).

<sup>163</sup> *Id.*

<sup>164</sup> Thorough coverage is beyond the scope of this Article, but can be found elsewhere. See John D. Bessler, *Tinkering Around the Edges: The Supreme Court’s Death Penalty Jurisprudence*, 49 AM. CRIM. L. REV. 1913, 1913 (2012); Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 CARDOZO L. REV. 1227, 1229 (2013).

*Furman* the Court held in *Woodson v. North Carolina* that it was unconstitutional to make the death penalty mandatory for first degree murder in part because of historical evidence that jurors would simply continue to exercise unguided discretion about who they convicted.<sup>165</sup> The same day, in *Gregg v. Georgia*, the Supreme Court held that the administration of the death penalty was constitutional under the Eighth and Fourteenth Amendments, so long as procedural protections guided and limited the bases on which it was imposed, and provisions for appellate review to ensure that it was not used only in a rare, arbitrary, or discriminatory way.<sup>166</sup> A year later, in *Coker v. Georgia*, the Court held that the death penalty was an unconstitutional punishment for rape of an adult woman.<sup>167</sup> Thus, within half of a decade of *Furman* and without ever overtly discussing racial bias, the Court effectively outlawed uses of the death penalty in precisely the conditions under which the social science presented to them and cited by Justice Marshall indicated that it was most likely to be discriminatory.

Sixteen years after *McGautha*, in *McCleskey v. Kemp*, the Court again squarely engaged with the issue of whether demonstrable racial disparities in the outcomes of capital cases, which were assumed to result from discretion of prosecutors and the jury, violated the Equal Protection Clause of the Fourteenth Amendment.<sup>168</sup> As part of its argument, the defendant presented the Court with sociologist David Baldus's analysis of the outcomes of over 2,000 contemporary murder cases in Georgia.<sup>169</sup> The main results, summarized in Figure 5,<sup>170</sup> showed that prosecutors sought and jurors awarded the death penalty substantially more often when the victims were White than when they were Black, suggesting a lower value for Black than White lives. Moreover, this "race-of-victim effect"<sup>171</sup> was larger when the defendant in the case was Black, suggesting that killing someone who is White is seen by prosecutors and jurors as particularly egregious when the person who does so is Black.

---

<sup>165</sup> *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976).

<sup>166</sup> *Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976).

<sup>167</sup> *Coker v. Georgia*, 433 U.S. 584, 599 (1977).

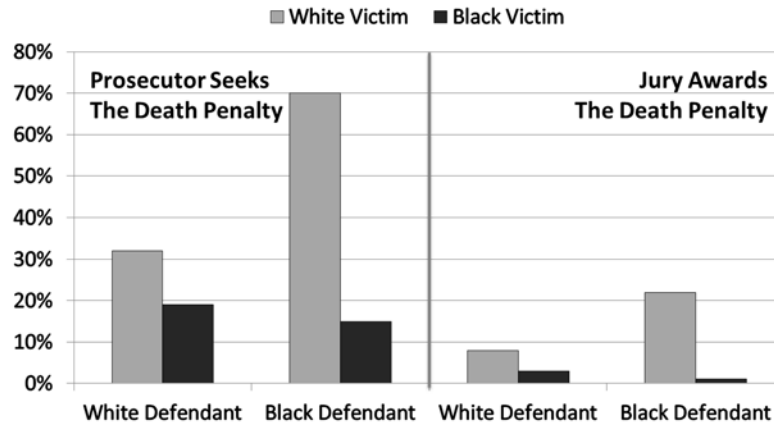
<sup>168</sup> *McCleskey v. Kemp*, 481 U.S. 279, 282–83 (1987).

<sup>169</sup> *Id.* at 286.

<sup>170</sup> *Id.* at 286–87. Bars on the left panel represent the percent of cases in which prosecutors sought the death penalty and those on the right panel represent the percent of cases in which the jury awarded the death penalty.

<sup>171</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 6 (1990).

**Figure 5: Percent of Death Penalty Prosecutions and Awards for Capital Offenses by Race of Defendant and Race of Victim**



To rule out the possibility that differences in aggravating and mitigating factors could explain the racial differences, Baldus conducted additional analysis statistically controlling for thirty-nine alternative non-racial predictors and found that the racial bias persisted.<sup>172</sup> Further, as was the case with Texas data presented to the Court in *Furman*, overall, his analysis showed that “black defendants were 1.1 times as likely to receive a death sentence as other defendants.”<sup>173</sup> Finally, relying upon a statistical model that controlled for an even larger set of 230 non-racial explanations, Baldus concluded that racial discrepancies did not exist either for “tremendously aggravated” cases, in which there was consensus that the death penalty was appropriate or in those cases where jurors were most likely to agree, based on the circumstances, that it was not appropriate.<sup>174</sup> Rather, “[i]t’s only in the mid-range of cases where the decision makers have a real choice as to what to do. If there’s room for the exercise of discretion, then the [racial] factors begin to play a role.”<sup>175</sup>

The Supreme Court accepted the social scientific evidence presented by Baldus as valid.<sup>176</sup> And both the majority and dissent cited

<sup>172</sup> *McCleskey*, 481 U.S. at 287.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 287 n.5.

<sup>175</sup> *Id.* (second alteration in original). For a discussion of the impact of discretion on use of stereotypes in legal decision-making, see generally, e.g., Girvan, *supra* note 18.

<sup>176</sup> *McCleskey*, 481 U.S. at 279.

*Washington v. Davis* for the proposition that a “defendant who alleges an equal protection violation has the burden of proving ‘the existence of purposeful discrimination.’”<sup>177</sup> Under this standard, while the empirical analysis before the Court showed that there was an increased, race-based risk of receiving the death penalty, it did not “*prove*” that race intentionally entered into the sentencing decision.<sup>178</sup> Nor did it indicate that the system was “arbitrary and capricious in application.”<sup>179</sup> On this basis, the Court held that use of the guided discretionary practices under these circumstances did not violate the Constitution.<sup>180</sup> Thus, an essentially identical discriminatory effect size, 1.1, to the one that motivated Justice Douglas to find the death penalty unconstitutional in *Furman* was found to be constitutionally insignificant here.

Why, when presented with some of the most rigorous social science available, did the Court not recognize a constitutional right to be free from the remaining racial bias as well? Was it for lack of knowledge or information about the potential for bias? Or did concerns about available remedies and what it would take to remove racial discrimination prevent the Court from taking this last step? The evolution of constitutional doctrine regarding the death penalty over this period generally, and the majority opinion in *McCleskey* in particular, support the latter. First, the Court was not silent on the possible influence of bias, nor did it deny that it might be at play here. To the contrary, Justice Powell, writing for the majority in *McCleskey*, accepted the results of David Baldus’s research. And he acknowledged that there continued to be “some risk of racial prejudice influencing a jury’s decision.”<sup>181</sup> It was simply his view that the risk described by Baldus’s research was not large enough to be “constitutionally unacceptable.”<sup>182</sup> Second, in the years between *Furman* and *McCleskey*, the Court appears to have been responsive to the social science presented to them in *Furman*. Over that period they held that the most significant sources of discrimination in awarding the death penalty (i.e., the unguided discretion and capital punishment for rape identified in the research reviewed by Justice Marshall) were

---

<sup>177</sup> *Id.* at 292; *see also id.* at 351 (Blackmun, J., dissenting) (citing *Washington v. Davis*, 426 U.S. 229, 239–40 (1976)).

<sup>178</sup> *Id.* at 292–99; *see also id.* at 322 (Brennan, J., dissenting).

<sup>179</sup> *Id.* at 308.

<sup>180</sup> *Id.* at 297–99.

<sup>181</sup> *Id.* at 308.

<sup>182</sup> *Id.* at 308–09.

unconstitutional.<sup>183</sup> And Justice Powell pointedly observed in *McCleskey* that the Court had been “engaged in ‘unceasing efforts’ to eradicate racial prejudice from our criminal justice system” in other contexts, like jury selection.<sup>184</sup> Third, suggesting that the Court fully understood that discretion presented the most significant continuing source of discrimination, Powell’s opinion dwelt at length on the countervailing importance of juror discretion in deciding who should be given the death penalty:

Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.<sup>185</sup>

Finally, the majority opinion suggests that the Court believed that the level of discrimination identified by Baldus was so widespread and the steps necessary for governments to reduce or eliminate it so “totally unrealistic”<sup>186</sup> that recognizing a constitutional right to be free from it

---

<sup>183</sup> See discussion *supra* notes 165, 167 and accompanying text.

<sup>184</sup> *McCleskey*, 481 U.S. at 309.

<sup>185</sup> *Id.* at 313.

<sup>186</sup> *Id.* at 319 (citing *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976)). To the extent the majority of Justices believe that the law is impotent to remedy widespread racial bias, they echo the sentiment of the Court in *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896), *overruled by* *Brown v. Bd. of Educ. of Topeka, Kan.*, 347 U.S. 483 (1954) (“The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits, and a voluntary consent of individuals. As was said by the court of appeals of New York in *People v. Gallagher*, 93 N. Y. 438, 448: ‘This end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed.’ Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.”).

would probably undermine the criminal justice system, something that they were unwilling to do.<sup>187</sup>

## 2. *Discretionary Standards in Employment Discrimination*

A second area in which antidiscrimination doctrine appears to have developed in response to judicial knowledge of the relevant social scientific evidence, and then became checked or restricted based on remedial considerations, is that involving claims for employment discrimination under Title VII for use of discretionary standards. In 1988, in *Watson v. Fort Worth Bank and Trust*, the U.S. Supreme Court recognized that discretionary employment practices, when paired with appropriate statistical evidence showing discrimination, could operate as an actionable conduit for discrimination under a disparate impact theory.<sup>188</sup> In the case, an African American employee of a small bank, having approximately eighty employees, applied for promotion four times.<sup>189</sup> Each time, the bank, which lacked “precise and formal criteria for evaluating candidates,” relied upon the “subjective judgment of supervisors who were acquainted with the candidates and with the nature of the jobs to be filled” in order to select who was promoted.<sup>190</sup> Each time the plaintiff was passed over in favor of a White applicant.<sup>191</sup> In response, she sued her employer under Title VII alleging both disparate treatment and disparate impact claims.<sup>192</sup>

The case was styled, and initially certified, as a class action on behalf of all Black individuals who applied to be or were employees of the

---

<sup>187</sup> Brennan, writing for the dissent, critiques the majority for their unwillingness to address the issue. *McCleskey*, 481 U.S. at 339 (Brennan, J., dissenting) (“The Court next states that its unwillingness to regard petitioner’s evidence as sufficient is based in part on the fear that recognition of McCleskey’s claim would open the door to widespread challenges to all aspects of criminal sentencing. Taken on its face, such a statement seems to suggest a fear of too much justice. Yet surely the majority would acknowledge that if striking evidence indicated that other minority groups, or women, or even persons with blond hair, were disproportionately sentenced to death, such a state of affairs would be repugnant to deeply rooted conceptions of fairness. The prospect that there may be more widespread abuse than McCleskey documents may be dismaying, but it does not justify complete abdication of our judicial role. The Constitution was framed fundamentally as a bulwark against governmental power, and preventing the arbitrary administration of punishment is a basic ideal of any society that purports to be governed by the rule of law.” (citation omitted)).

<sup>188</sup> *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 999–1000 (1988).

<sup>189</sup> *Id.* at 982.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 984.



bank during the relevant period.<sup>193</sup> With respect to applicants, in support of her allegations, Watson's expert proffered a basic descriptive statistical analysis showing, among other things, that the bank had hired 89 of 533 White applicants (16.7%) but only 6 of 144 Black applicants (4.2%) over the relevant period.<sup>194</sup> With respect to the employees, the expert's analysis showed that, in four separate annual evaluations, the bank's Black employees were rated, on largely subjective criteria,<sup>195</sup> an average of 11 to 15 points lower than non-Black employees.<sup>196</sup> When the effects of experience and job grade at the time of hiring were controlled for, the average differences increased to approximately 34 to 40 points.<sup>197</sup> In terms of outcomes, the statistics also showed that, as compared to White employees, these Black employees:

- Were promoted at slower rates (average annual increase in grade .53 versus .18, respectively),
- Received lower wage increases (average annual increase 14.9% versus 12.0%, respectively),
- Topped out at lower job grades (average final grade 5.29 versus 4.13, respectively), and
- Were paid lower salaries (average per month \$917.15 versus \$861.47, respectively).<sup>198</sup>

---

<sup>193</sup> *Id.* at 983.

<sup>194</sup> *Watson v. Fort Worth Bank & Trust*, 798 F.2d 791, 811 n.20 (5th Cir. 1986) (Goldberg, J., dissenting), *vacated*, 487 U.S. 977 (1988).

<sup>195</sup> *Id.* at 812–13 & n.26 (“Each supervisor rates the employees under his or her supervision in twelve categories on a scale from zero to seven, eight, nine, or ten. The categories are: (1) Accuracy of work; (2) Alertness; (3) Personal Appearance; (4) Supervisor-co-worker relations; (5) Quantity of Work; (6) Physical Fitness; (7) Attendance; (8) Dependability; (9) Stability (‘The ability to withstand pressure and remain calm in most situations’); (10) Drive (‘Ambition’); (11) Friendliness and Courtesy; and (12) Job Knowledge. . . . Few of these categories have much objective content. For example, ‘personal appearance,’ ‘drive,’ and ‘friendliness and courtesy’ are clearly subjective on their face. While ‘Quantity of Work’ could lend itself to objective measurement, the rating system itself is also subjective: 0–1, ‘does not meet minimum requirement’; 2–3, ‘does just enough to get by’; 4, ‘volume of work is satisfactory’; 5–6, ‘very industrious does more than is required’; 7–8, ‘superior work production record.’ This type of subjective measurement lends itself to discriminatory bias, be it conscious or unconscious.”).

<sup>196</sup> *Id.* at 812–13.

<sup>197</sup> *Id.* at 813.

<sup>198</sup> *Id.* at 813 n.29.

The significant racial discrepancies remained even after controlling for other factors such as employee education and experience.<sup>199</sup>

Finding that the putative applicant and employee class members lacked a common question of law or fact under Rule 23(a), the district court decertified the broader class and split it in two, one for applicants and another for employees.<sup>200</sup> Subsequent evidence showed that the class of Black employees, which consisted of just eleven individuals,<sup>201</sup> was too small to satisfy the numerosity requirement of Rule 23(a).<sup>202</sup> Accordingly, the employee class was decertified.<sup>203</sup> The district court nevertheless went on to hear the plaintiff's individual claim under a disparate treatment theory, ultimately finding against her.<sup>204</sup>

On appeal to the Supreme Court, Justice O'Connor, writing for the majority, affirmed that plaintiffs in disparate treatment claims were required to prove "that the defendant had a discriminatory intent or motive."<sup>205</sup> Under a disparate impact theory, however, the plaintiff could succeed by proving only that employment practices had "significant adverse effects on protected *groups*," whether or not she could show that the practices were adopted with discriminatory intent.<sup>206</sup> The issue was whether an employer's policy of relying upon its supervisors' discretion could qualify as such a practice, an issue on which the circuit courts had split.<sup>207</sup>

Justice O'Connor thought that it should.<sup>208</sup> In support of this position, she acknowledged that it was reasonable, particularly for small businesses that could not afford to develop and validate other measures, to rely upon supervisors' experience and judgment.<sup>209</sup> As such, a policy or practice of doing so for promotion decisions should not itself give rise to a claim. Indeed, the consequence of holding otherwise would likely be that employers would move to a quota

---

<sup>199</sup> *Id.* at 813 n.30.

<sup>200</sup> *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 983 (1988).

<sup>201</sup> *Watson*, 798 F.2d at 813–14 n.31 (Goldberg, J., dissenting).

<sup>202</sup> *Id.* at 799 (majority opinion).

<sup>203</sup> *Id.* at 797 n.10.

<sup>204</sup> *Id.* at 797.

<sup>205</sup> *Watson*, 487 U.S. at 986.

<sup>206</sup> *Id.* at 986–87.

<sup>207</sup> *See id.* at 988.

<sup>208</sup> *Id.* at 991.

<sup>209</sup> *Id.* at 990–91. For an alternative solution, see Girvan & Deason, *supra* note 8, at 1097.

system to insulate themselves from liability, itself an unacceptable outcome and a violation of the Constitution.<sup>210</sup>

Even if relying upon discretionary criteria was reasonable, however, it did not mean employers could never be liable for doing so. To the contrary, they could be held liable if the supervisors had discriminatory motives or were impacted by what we would now call implicit bias:

Furthermore, even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain. In this case, for example, petitioner was apparently told at one point that the teller position was a big responsibility with “a lot of money . . . for blacks to have to count.” Such remarks may not prove discriminatory intent, but they do suggest a lingering form of the problem that Title VII was enacted to combat. If an employer’s undisciplined system of subjective decisionmaking [sic] has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII’s proscription against discriminatory actions should not apply. In both circumstances, the employer’s practices may be said to “adversely affect [an individual’s] status as an employee, because of such individual’s race, color, religion, sex, or national origin.”<sup>211</sup>

Thus, expressly recognizing the phenomenon of non-purposeful discrimination and its relationship to discretion, the Court held that relying upon discretionary or subjective standards could support a discrimination claim.<sup>212</sup>

To do so, the Court held that the plaintiff must also be able to satisfy certain other evidentiary thresholds.<sup>213</sup> These include: (1) identification of a specific employment practice, of which reliance on supervisor discretion could be one; (2) causation, often in the form of statistical evidence of disparities; and (3) if an employer asserts that it used that practice out of a business necessity, that “other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer’s legitimate interest,” including that of cost and the burden of implementation.<sup>214</sup> Having established these standards, and with the express recognition that “[i]t may be that the relevant data base is too small to permit any meaningful statistical analysis,” the

---

<sup>210</sup> *Watson*, 487 U.S. at 992.

<sup>211</sup> *Id.* at 990–91 (alterations in original) (internal citation omitted) (citing 42 U.S.C. § 2000e-2(a)(2)).

<sup>212</sup> *Id.* at 991.

<sup>213</sup> *Id.* at 998.

<sup>214</sup> *Id.* at 994–98.

Court remanded the case to the district court to determine whether the plaintiff could satisfy them.<sup>215</sup>

Twenty-three years after *Watson*, the Supreme Court was presented with much more rigorous social scientific analysis and substantially more sophisticated empirical evidence of widespread injury from non-purposeful discrimination. Just as in *McCleskey*, the Court responded to this information by checking or restricting the plaintiffs' substantive rights rather than providing a remedy for their breach. In *Wal-Mart Stores, Inc. v. Dukes*, three plaintiffs brought a class action against Wal-Mart, the United States' largest retailer, for discrimination against female employees in pay and promotions.<sup>216</sup> The putative class included approximately 1.5 million women and implicated each of the retailer's 3,400 stores.<sup>217</sup>

The crux of the plaintiffs' argument was that, with minimal restrictions, Wal-Mart relied upon the subjective decisions of its store managers for compensation and promotion decisions.<sup>218</sup> In support of their allegations that this resulted in a discriminatory impact, the plaintiffs provided expert testimony from a sociologist.<sup>219</sup> He described the conditions under which social scientific research suggests that use of discretionary criteria is most likely to result in gender bias against employees: where the employee's gender is inconsistent with the stereotypical employee for a position (e.g., women in leadership or management positions, which are stereotypically held by men, but not in customer service positions, which are stereotypically held by women).<sup>220</sup> In addition, the plaintiffs provided statistical evidence that was consistent with this testimony.<sup>221</sup> It showed, for example, that 65% of the hourly, but only 33% of the salaried management, employees were women.<sup>222</sup> This was a result of "a statistically significant shortfall of women being promoted into each of the in-store management classifications over the entire class period."<sup>223</sup> Where men took on average 2.86 years to be promoted to assistant manager and 8.64 years to reach store manager, women took 4.38 years and 10.12 years to reach

---

<sup>215</sup> *Id.* at 1000.

<sup>216</sup> *Wal-Mart Stores, Inc., v. Dukes*, 131 S. Ct. 2541, 2547 (2011).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 153 (N.D. Cal. 2004).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 146.

<sup>223</sup> *Id.* at 160.

the same positions, respectively.<sup>224</sup> Similarly, within the hourly ranks, customer service positions had the largest percentages of women (85% to 90%)<sup>225</sup> and there was substantial sex-based segregation by work area (e.g., 89.5% of cashiers were women while 75% of hardware sales associates were men).<sup>226</sup> Beyond these differences, and even after controlling for other factors such as seniority and performance, “total earnings paid to women ranged between 5 and 15 percent less than total earnings paid to similarly situated men in each year of the class period.”<sup>227</sup> Finally, the plaintiffs showed that Wal-Mart’s percentage of female in-store managers, 34.5%, was substantially lower than that of other large, national retailers, which averaged 56.5%.<sup>228</sup> Based on this evidence, the plaintiffs sought injunctive and declaratory relief, lost pay, and punitive damages.<sup>229</sup>

The district court certified the class.<sup>230</sup> Because of Wal-Mart’s size, the class was by far the largest in U.S. history.<sup>231</sup> Recognizing that it was granting class certification in the fiftieth anniversary year of *Brown v. Board of Education*, however, the district court did not shy away from the scope of the case.<sup>232</sup> Rather, adopting a conventional rights-

---

<sup>224</sup> *Id.* at 161.

<sup>225</sup> *Id.* at 146.

<sup>226</sup> *Id.* at 156 n.24.

<sup>227</sup> *Id.* at 156.

<sup>228</sup> *Id.* at 165.

<sup>229</sup> *Id.* at 141.

<sup>230</sup> *Id.* at 188.

<sup>231</sup> Principal Brief for Wal-Mart Stores, Inc. at 1, *Dukes v. Wal-Mart Stores, Inc.*, 474 F.3d 1214 (9th Cir. 2007) (Nos. 04-16688, 04-16720), 2004 WL 3080794.

<sup>232</sup> See *Dukes*, 222 F.R.D. at 142. Setting aside romantic notions associated with *Brown*, the willingness of the courts to do what it took to dismantle segregation was actually rather short lived. Indeed, although *Brown* articulated the right to equality and integration in 1954, it was only between *Green v. County School Board of New Kent County, Virginia*, 391 U.S. 430, 437–38 (1968) and *Milliken v. Bradley*, 418 U.S. 717, 737 (1974) that the Supreme Court actually supported the remedial efforts necessary to realize this goal. As a result, *de facto* segregation in many areas of the United States is now worse than *de jure* discrimination under *Plessy*’s separate but equal regime. See generally THE PURSUIT OF RACIAL AND ETHNIC EQUALITY IN AMERICAN PUBLIC SCHOOLS: MENDEZ, BROWN, AND BEYOND (Kristi L. Bowman ed., 2015) (discussing the legal and policy reforms that have been achieved and those that are still needed to achieve the goals of *Brown*); GARY ORFIELD & CHUNGMEI LEE, CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES (2007), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating-resegregation-and-the-need-for-new-integration-strategies-1/orfield-historic-reversals-accelerating.pdf> (arguing that the Supreme Court’s decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007) has supported resegregation in U.S. public schools to the detriment of

focused perspective in which violations of substantive rights lead to employer liability, it viewed the scope of the alleged violation as irrelevant to, or even supporting, its decision: “This anniversary serves as a reminder of the importance of the courts in addressing the denial of equal treatment under the law wherever and by whomever it occurs.”<sup>233</sup> On appeal, the U.S. Supreme Court did not seem to share this view.<sup>234</sup>

Justice Scalia, writing for the majority, acknowledged the Court’s basic observation in *Watson* that “an employer’s undisciplined system of subjective decisionmaking [sic] [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination.”<sup>235</sup> At no point, however, did he endorse the possibility of liability for anything but intentional discrimination or discriminatory impacts from specific, affirmative practices such as use of aptitude tests or educational achievements. To the contrary, the majority opinion holds that a policy of relying upon discretion is not an actionable policy at all:

The only corporate policy that the plaintiffs’ evidence convincingly establishes is Wal-Mart’s “policy” of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices.<sup>236</sup>

On this basis, after explicitly rejecting the relevant social scientific theory, the Court reiterated “that merely proving that the discretionary system has produced a racial or sexual disparity *is not enough*.”<sup>237</sup> And

---

students of all races); GARY ORFIELD, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION (2001), <http://files.eric.ed.gov/fulltext/ED459217.pdf> (detailing the benefits of desegregation in U.S. schools).

<sup>233</sup> *Dukes*, 222 F.R.D. at 142. This observation is somewhat ironic in light of the substantial restrictions the Court has placed on the ability of courts and communities to remedy the substantive rights recognized in *Brown*. See generally THE PURSUIT OF RACIAL AND ETHNIC EQUALITY IN AMERICAN SCHOOLS, *supra* note 232; ORFIELD & LEE, *supra* note 232; ORFIELD, *supra* note 232.

<sup>234</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554 (2011). Nor did the dissent at the court of appeals, which the majority there noted: “Ten times the dissent points out the large class size, referring to the ‘1.5 million’ women alleging discrimination as a reason to reject certification.” *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 578 n.3 (9th Cir.), *rev’d*, 131 S. Ct. 2541 (2011).

<sup>235</sup> *Dukes*, 131 S. Ct. at 2554 (alteration in original) (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990–91 (1988)).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 2555.

it ultimately held that the plaintiffs had not satisfied the commonality requirement of Rule 23 and thus that the class should be decertified.<sup>238</sup>

As with the death penalty jurisprudence, the evolution of liability for discrimination resulting from discretionary decision-making is more consistent with judges denying a substantive claim out of remedial concerns than doing so from a lack of knowledge of the relevant social science. Contrary to the latter explanation, the majority opinion in *Watson* was based upon an expressed understanding that plaintiffs, at least in the aggregate, ought to have a right to be free from non-purposeful discrimination that has a disparate impact. Similarly, in *Dukes*, the Supreme Court had not only this precedent but the benefit of additional briefing and expert testimony about the problem of systematic discrimination from implicit forms of bias in discretionary decision-making. Nevertheless, it expressly rejected the relevance of the science and ultimately treated the disparate impact claim as if it was limited to situations in which the harm is traceable to a directive to take specific discriminatory actions.

By comparison, and supporting the remedies explanation, *Watson* involved a relatively small employer and a class of eleven individuals which was ultimately too small to satisfy the numerosity requirements of Rule 23. On the one hand, particularly given the difficulties the plaintiff faced on the issues on remand, the situation and precedent posed little threat of requiring substantial judicial intervention. On the other hand, the plaintiffs in *Wal-Mart*—or more precisely their counsel—structured the putative class to place the problem of pervasive, subtle sources of discrimination squarely before the Court. As the district court realized in certifying the class, given the asserted basis of the claim against *Wal-Mart* and requested remedies (i.e., injunctive relief), recognizing a right to proceed with a nation-wide class of 1.5 million women was tantamount to committing the court to attempt to resolve implicit gender bias in the private sector.

### III

#### AVAILABLE ALTERNATIVES

The two examples described above are not the only ones that demonstrate a pattern of expansion and contraction of substantive

---

<sup>238</sup> *Id.* at 2557.

antidiscrimination rights.<sup>239</sup> They are intended to illustrate how courts hearing claims for discrimination have, at various times, been responsive to psychological science regarding implicit bias and the associated problems with discretionary decisions. They also show that litigants who have relied upon the strategy of presenting more or better information about the relevant social scientific theory and methodologically rigorous evidence of a resulting injury have not always been successful. To the contrary, at least in these examples, the more detailed the science and rigorous the methods supporting the assertion that racial bias caused widespread injury, the *less* willing the Supreme Court was to recognize a substantive right to recover for it. This pattern runs directly contrary to what we would expect if the lack of knowledge of judges was the primary barrier to closing the antidiscrimination law-science gap. But, considering the cases involved from the perspective of the majority (i.e., the Justices that the plaintiffs needed to convince), the results appear to support the remedies perspective.

Consistent with work on implicit bias, the social scientific theory and data presented to the Court in *McCleskey* and *Dukes* suggested that, as a factual matter, criminal defendants and employees are treated differently because of race or sex. To the former, by holding that the Constitution prohibits imposition of the death penalty in rape cases and in the unguided discretion of jurors, and by allowing parties to challenge race-based peremptory strikes, the Court had already picked the low hanging remedies fruit. Recognizing that a right to be free from the sort of discrimination that remained would thus require the judiciary to engage in a far more substantial, searching, and fundamental process of systemic change. Indeed, it is only from the remedies perspective that it makes sense that a majority would cite studies showing racial disparities in prison sentences<sup>240</sup> *in support of* its position that the Constitution did *not* provide a right to relief:

McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal

---

<sup>239</sup> For example, see the evolution of law on the extent to which structural discrepancies can be used to state a claim for unequal pay through *County of Washington v. Gunther*, 452 U.S. 161 (1981), *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982), *American Federation of State, County, and Municipal Employees, AFL-CIO (AFSCME) v. Washington*, 770 F.2d 1401 (9th Cir. 1985), *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), *superseded by statute*, 42 U.S.C. § 2000e-2, as recognized in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct 2507, 2523 (2015), and *Green v. USX Corp.*, 896 F.2d 801 (3d Cir. 1990).

<sup>240</sup> *McCleskey v. Kemp*, 481 U.S. 279, 315 n.38 (1987).



justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties. Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.<sup>241</sup>

To the latter doctrinal area, from a remedies perspective, it is one thing to recognize that implicit racial bias was likely to influence the decisions of a few managers in a small bank in Texas about a few of its Black employees. While it may be difficult to stamp out that sort of bias itself, the scope of the problem seems manageable. It is entirely another to consider how implicit gender bias might impact millions of decisions of tens of thousands of managers who live in a range of geographical regions and have different backgrounds and beliefs. In that context, social scientific theory and evidence that emphasize how non-purposeful discrimination is pervasive and robust would only exacerbate perceptions that courts may be required to undertake extraordinary, and potentially socially and politically costly, efforts to adequately address an intractable problem. Faced with the need to undertake such efforts, it is perhaps understandable why, as depicted in Figure 3, courts might opt to restrict the scope of plaintiffs' substantive rights to the point that remedies implications present an acceptable burden for the courts and are perceived to have some reasonable chance of success.

The remedies perspective thus provides a potentially more accurate alternative explanation for the development of antidiscrimination doctrine in these areas to simple lack of knowledge. Even accepting that it is descriptively accurate, however, it may beg the ultimate question. There is certainly precedent for judges being willing to take extraordinary steps to remedy serious civil rights issues.<sup>242</sup> In light of these cases, it is reasonable to interpret judges' reliance upon subjective terms like "acceptable" and "reasonable" in the remedies account as merely concealing the root cause of their unwillingness to expand

---

<sup>241</sup> *Id.* at 314–15 (internal citations omitted).

<sup>242</sup> See *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 301 (1955); *Milliken v. Bradley*, 418 U.S. 717, 752–53 (1974); *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 213–14 (1973); *Green v. Cty. Sch. Bd. of New Kent Cty., Va.*, 391 U.S. 430, 441–42 (1968); *Brown v. Bd. of Educ. of Topeka, Kan.*, 347 U.S. 483, 496 (1954). For a discussion and critique of such judicial activism in civil rights, see, e.g., OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION*, 86–90 (1978); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978).

antidiscrimination rights: Their objection, on ideological grounds, to such substantive rights themselves.<sup>243</sup>

This critique treats motivations as the primary determinant as to whether someone undertakes a task. Psychological theory, however, has long suggested that engagement with and performance in a task is a function of both motivation and ability.<sup>244</sup> All else being equal, when deciding to undertake a task, as peoples' abilities (e.g., knowledge, skill, and experience) in a given domain increase, how motivated they need to be in order to decide to work toward a fixed goal in that domain (i.e., how much effort they must be willing to expend) decreases.<sup>245</sup> Similarly, people can and do compensate for a lack of ability when they are highly motivated to achieve their goals.<sup>246</sup> Thus, however desirable some people find an outcome in the abstract, they will tend to cease any efforts to achieve their goal if they do not believe they have the ability to do so with the effort they are willing to expend.<sup>247</sup>

Within the context of this theory, judges' ideologies, values, attitudes, and beliefs regarding equality in particular—among other factors—are likely to influence how motivated they are to attempt to

---

<sup>243</sup> For sources providing evidence that Justices' and judges' political ideology are fairly strong predictors of their votes in civil rights cases, see LEE EPSTEIN, ET AL., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013); Jeffery A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

<sup>244</sup> See generally Norman H. Anderson & Clifford A. Butzin, *Performance = Motivation x Ability: An Integration-theoretical Analysis*, 30 J. PERSONALITY & SOC. PSYCHOL. 598 (1974) (analyzing a mathematical formula that can predict performance based on the subject's motivation and ability); Ramadhar Singh & Shivganesh Bhargava, *Motivation, Ability, and Exam Performance: Tests of Hypotheses of Cultural Difference and Task Difficulty*, 21 J. EXPERIMENTAL SOC. PSYCHOL. 466 (1985) (finding cultural differences in the theory of motivation); Allan Wigfield & Jacquelynne S. Eccles, *Expectancy—Value Theory of Achievement Motivation*, 25 CONTEMP. EDUC. PSYCHOL. 68 (2000) (discussing the theory of motivation).

<sup>245</sup> See sources cited *supra* note 244.

<sup>246</sup> See sources cited *supra* note 244.

<sup>247</sup> For example, the theory of planned behavior describes how perceived behavioral control (i.e., people's confidence in their ability to successfully accomplish a goal) is strongly related to whether they undertake actions in furtherance of the goal. See generally, e.g., Icek Ajzen & Thomas J. Madden, *Prediction of Goal-Directed Behavior: Attitudes, Intentions, and Perceived Behavioral Control*, 22 J. EXPERIMENTAL SOC. PSYCHOL. 453 (1986) (proposing the theory of planned behavior); Icek Ajzen, *The Theory of Planned Behavior*, 50 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 179 (1991) (discussing needed research into the theory of planned behavior); Christopher J. Armitage & Mark Conner, *Efficacy of the Theory of Planned Behaviour: A Meta-Analytic Review*, 40 BRIT. J. SOC. PSYCHOL. 471 (2001) (reviewing the research on the theory of planned behavior); Albert Bandura, *Self-Efficacy: Toward a Unifying Theory of Behavioral Change*, 84 PSYCHOL. REV. 191 (1977) (describing the psychological theory of self-efficacy).

redress injuries from implicit bias. As explained in prior research, there is reason to believe that ideological conservatives are more ambivalent about the costs and benefits of inequality than ideological liberals.<sup>248</sup> This would translate into lower motivation to engage with the issue or attempt to remedy it. Even so, at any level of motivation up to the inflection point beyond which a hypothetical judge affirmatively desired to *increase* discrimination, the probability of the judge deciding to engage with the problem of implicit bias will be a function of the judge's perception of whether the amount of effort that they are willing to expend can successfully get the job done.<sup>249</sup> This is where the relationship between the relative scope of the harm and perceived availability and efficacy of remedies for it may become a critical factor in judicial decisions about whether to expand or contract substantive antidiscrimination rights. If judges perceive that the breadth of injury from non-conscious discrimination far outstrips research on how to address it, then only the most motivated of them are likely to commit themselves or the judicial system to explore how to fix it. Contemporary opinions engaging directly with and accepting research on implicit bias, but refusing to recognize a right to be free from harm caused by it, provide some evidence that this is exactly what many judges believe the current state of affairs to be.

[T]he disparity in sentencing of these individuals who are so similarly situated, save race or ethnicity, at least requires consideration of what impact unconscious preferences or biases may have played in the disparity.

Because there is no "cure" for completely ridding ourselves of these hidden influences, an appreciation for their existence and an awareness of how they impact decision making will go a long way in helping to improve our justice system. Continuing education, discussions, and research will aid these endeavors.<sup>250</sup>

With this perspective and the goal of exploring how to close or bridge the antidiscrimination law-psychology gap in mind, the remainder of the section proceeds in two parts. The first critiques what is known about how to successfully address implicit bias.<sup>251</sup> It shows that, while there is a substantial amount of research and theory about what can attenuate the impact of implicit bias, thus far this work has

---

<sup>248</sup> Girvan, *supra* note 6, at 55–57.

<sup>249</sup> *See id.* at 44.

<sup>250</sup> *State v. Sherman*, No. 97840, 2012 WL 3765041 (Ohio Ct. App. Aug. 30, 2012).

<sup>251</sup> For a collection of resources on and suggestions about how to address implicit bias, see Girvan, *supra* note 6, and *infra* Appendix A.

produced far more recommendations rather than validated interventions. Accordingly, a court faced with the problem of remedying implicit bias would likely have to be willing to supervise or commission an intervention development project or be satisfied with substitutionary relief (e.g., money damages), neither of which may be particularly appealing. Given this, the second part suggests ways in which advocates may be able to overcome remedies concerns in antidiscrimination litigation.

### *A. Addressing Implicit Bias*

Over the last twenty years, researchers have explored questions that could assist a judge to craft a remedy for implicit bias: When it is most influential, when it is not, what can cause implicit biases to change, and what is not effective for doing so?<sup>252</sup> Insights from this work have been expertly summarized elsewhere in a way that is accessible to legal audiences.<sup>253</sup> However, because most of this work involves laboratory studies designed to test the basic psychological theory regarding psychological processes associated with implicit bias, outside the laboratory the insights produce only general guidance and recommendations, not field-tested interventions. As researchers in applied social scientific fields like education have learned, the difference between the two can be substantial:

Most change efforts in education over the past 25 years have met with limited success. Even when supported by federal or state government mandates, the level of successful implementation of innovative programs has been very low. Mann (1978) studied nationwide school reform initiatives and cited the success rate at about 20% for actual change in educational programs as a result of planned innovations.

---

<sup>252</sup> See generally Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242; Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800 (2001); Calvin K. Lai et al., *Reducing Implicit Prejudice*, 7 SOC. & PERSONALITY PSYCHOL. COMPASS 315 (2013) [hereinafter *Reducing Implicit Prejudice*]; Calvin K. Lai et al., *Reducing Implicit Racial Preferences: I. A Comparative Investigation of 17 Interventions*, 143 J. EXPERIMENTAL PSYCHOL. 1765 (2014); Laurie A. Rudman et al., *"Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SOC. PSYCHOL. 856 (2001).

<sup>253</sup> E.g., Kang et al., *supra* note 6; *Helping Courts Address Implicit Bias: Resources for Education*, NAT'L CTR. FOR STATE COURTS, <http://www.ncsc.org/ibeducation> (last visited Feb. 26, 2016); see also Girvan, *supra* note 6; *infra* Appendix A.

Current data seem to indicate that little has changed in the past few decades.<sup>254</sup>

Indeed, the entire field of implementation science is devoted to examining all that needs to be done to successfully translate theory produced in the laboratory to field settings.<sup>255</sup> Further, notwithstanding calls made a decade ago to “devote special attention to the promise of ‘debiasing’ actors,”<sup>256</sup> few sustained efforts have been undertaken to do this work. One example of an attempt to do so is captured by the National Center for State Court’s report on pilot projects in California, Minnesota, and North Dakota to address implicit bias in legal decision-making.<sup>257</sup> The report recognizes that the ultimate goal of the field studies included reducing discriminatory behavior attributable to implicit bias:

- Judges/court staff engage in activities to address their implicit biases.
- There are observable changes in judicial and staff decisions, and behaviors.
- Disparate case outcomes based on race and ethnicity are reduced.<sup>258</sup>

Nevertheless, because of time and resource constraints, the primary outcome reported was the extent to which judges learned something about implicit bias and were satisfied with the training that they received, not whether the training actually reduced the impacts of implicit bias.<sup>259</sup>

Because the national project was available to work with the selected states for only a finite period of time, the focus was on developing a specific program and identifying the short-term

---

<sup>254</sup> Michael P. George et al., *Implementing School-Wide Behavior Change: Lessons from the Field*, 44 PSYCHOL. SCHOOLS 41, 41 (2007) (internal citations omitted); see also K. Brigid Flannery et al., *School-Wide Positive Behavior Support in High School: Early Lessons Learned*, 11 J. POSITIVE BEHAV. INTERVENTIONS 177, 183–84 (2009).

<sup>255</sup> See, e.g., Susan Michie et al., *The Behaviour Change Wheel: A New Method for Characterising and Designing Behaviour Change Interventions*, 6 IMPLEMENTATION SCI. 42, 43 (2011).

<sup>256</sup> Jolls & Sunstein, *supra* note 6, at 973; see also Greenwald & Krieger, *supra* note 6, at 962–63.

<sup>257</sup> PAMELA M. CASEY ET AL., NAT’L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION 6 (2012), [http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB\\_report\\_033012.ashx](http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx).

<sup>258</sup> *Id.* at 29–31.

<sup>259</sup> *Id.* at 6.

outcomes resulting from the program. The project examined how judges and court staff reacted to the information. It did not measure the long-term effects of education on implicit bias.<sup>260</sup>

Thus, the primary, national research organization devoted to judicial reform through research and education was unable to conduct a sustained project to develop and adequately test an intervention for reducing the impacts of implicit bias in the courts. This is not unusual. Indeed, while there are numerous studies showing how implicit bias can be reduced in a laboratory,<sup>261</sup> published descriptions of field tests of interventions that are successful in reducing implicit bias are few and far between.<sup>262</sup>

It is not that psychologists who study implicit bias do not understand that more work is needed in this area. To the contrary, in their comprehensive review of work on implicit bias, Lai, Hoffman, and Nosek, conclude that, “[l]ooking forward, the next step is to investigate how these mechanisms can be utilized to reduce implicit prejudice for the practical interest of mitigating discrimination.”<sup>263</sup> Until that work is done, however, asking judges to take on the task of supervising the development of remedies for implicit bias, or even asking them to build in strong incentives for others to do so themselves, is more likely to be an uphill battle.

Here, the example of research on eyewitness testimony may provide guidance to psychologists on how to proceed. One of the fundamental differences between basic science lab research and field research exploring the malleability of implicit biases relates to the types of variables that have been and tend to be investigated—or not investigated as the case may be. Almost forty years ago, Gary Wells solved this problem and revolutionized the application of psychological science to assessments of the accuracy of eyewitness testimony in criminal trials by drawing a distinction between “estimator variables” and “system variables.”<sup>264</sup>

---

<sup>260</sup> *Id.* (internal cross-references omitted).

<sup>261</sup> See sources cited *supra* note 252.

<sup>262</sup> One notable example is the intervention described in Molly Carnes et al., *The Effect of an Intervention to Break the Gender Bias Habit for Faculty at One Institution: A Cluster Randomized, Controlled Trial*, 90 ACAD. MED. 221, 222 (2015); Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267, 1269 (2012).

<sup>263</sup> *Reducing Implicit Prejudice*, *supra* note 252, at 326.

<sup>264</sup> Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Values*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546, 1548 (1978).

The argument was that some of the variables that affect the accuracy of eyewitness reports were under the control (or potentially under the control) of the justice system (system variables) while others were not (estimator variables). For example, how eyewitnesses are interviewed by police and how eyewitnesses are instructed prior to viewing a lineup are system variables, because they can be controlled by the system that is collecting the eyewitness evidence. Other variables—such as cross-race versus within-race identifications or stress experienced by the witness during the event—cannot be controlled by the system.<sup>265</sup>

Social psychologists can control both kinds of variables in their laboratory experiments. To the extent realistic analogues of system variables are included as both the independent and dependent variables, however, the results of their research can not only help after the fact to assess when the effect of interest (e.g., eyewitness error, discrimination from implicit bias) likely occurred, but also affirmatively suggest ways in which it could be *prevented* in advance of any adverse decision.

Wells's distinction, however, is not always attended to in basic science research and has been largely neglected in research exploring the malleability of implicit bias. To illustrate, of the nearly fifty studies reviewed by Blair on this topic,<sup>266</sup> at most a few appear to involve manipulations that were measured using dependent variables that have direct real-world analogues. Furthermore, none of the manipulations appear to have been designed to include elements common to situations that produce litigation or the legal system within which such litigation is resolved. Similarly, in their review, Olson and Fazio distinguish between studies that attempt to de-bias participants with manipulations that change the construal or salient category of the object of the attitude or take advantage of the malleability of the attitudes themselves from those that target and seek to change the underlying cognitive associations themselves.<sup>267</sup> However, the studies reviewed do not appear to take advantage of manipulations that could be categorized as "system" variables.

To the extent that the remedies perspective captures the cause of the gap between law and science of discrimination, psychologists can help

---

<sup>265</sup> Gary L. Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 PSYCHOL. SCI. PUB. INT. 45, 47–48 (2006).

<sup>266</sup> Blair, *supra* note 252.

<sup>267</sup> Michael A. Olson & Russell H. Fazio, *Reducing Automatically Activated Racial Prejudice Through Implicit Evaluative Conditioning*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 421, 422–23 (2006).

close the gap by attending to the system-estimator distinction in laboratory work, then undertaking systematic efforts to field test interventions based on system variables that moderate implicit bias. Without this work, before judges recognize a right to be free from non-purposeful discrimination, they must not only be able to appreciate the harm, but must be willing to commit to undertake or oversee this intervention development work themselves. It is not impossible to imagine a judge who is so motivated to address implicit bias that he or she would do this. But considering that researchers at the intersection of the law and psychology of discrimination have not yet done so themselves—such a judge would have to be fairly extraordinary. Relying upon the good fortune of having one's case assigned to such a judge is generally not a winning litigation strategy. Accordingly, the Article next turns to possible approaches for addressing remedies concerns about implicit bias that can be taken in support of or as an alternative to further development of the relevant social science and thus, perhaps, present viable strategies for closing the gap in antidiscrimination law and psychology.

### *B. Alternative Remedies Strategies*

The first set of options for addressing remedies concerns involves structuring litigation and remedies requests in order to minimize the need for extensive court involvement in addressing implicit bias. One seemingly obvious way to do this is with substitutionary damages. Courts are used to awarding damages and doing so generally requires little oversight after an award is issued. Aside from ease of administrability, damage awards would theoretically internalize the costs of defendants' biased behavior thereby encouraging them to explore and potentially develop practical ways to address implicit bias.<sup>268</sup> Moreover, because monetary awards can be awarded collectively and distributed pro rata, they have the advantage of offering a way to accommodate probabilistic harm of the sort that implicit bias may produce.<sup>269</sup> Because social science is conducted at a

---

<sup>268</sup> Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 463 (2001); see also Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 719 (2003).

<sup>269</sup> Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 317 (1991). This is also possible as a statutory remedy. See, e.g., Linda S. Mullenix & Kristen B. Stewart, *The September 11th Victim Compensation Fund: Fund Approaches to Resolving Mass Tort Litigation*, 9 CONN. INS. L.J. 121, 123 (2002).



group level but legal cases concern particular individuals, it is impossible to say with certainty how much implicit bias impacts a particular judgment in a given case.<sup>270</sup> It is theoretically possible, however, to estimate the probabilistic impact of implicit bias on the members of a group or class. In this way, just as courts are able to recognize and award damages for probabilistic harm, such as the loss of likelihood to recover in medical malpractice cases,<sup>271</sup> courts could award damages in the amount of the expected value of lost income corresponding to the estimated impact of defendants' implicit biases on the plaintiffs.<sup>272</sup>

Substitutionary damages may, however, ultimately be unacceptable or undesirable if they are too broad in scope. One of the characteristic concerns of the Court in *McCleskey* and *Dukes* was the expansive nature of the alleged problem and, by implication, the required intervention. By carefully structuring litigation around narrow contexts that are functionally defined in ways that maximize the probability that the defendants' implicit biases impacted their decisions, parties may be able to reduce or eliminate such concerns. Classes that target discretionary decision-making in general may implicate too many situations to seem acceptable or enable reasonable inferences from existing theory. Cases that focus on disparities in a specific decision context within an organization may be tailored such that their scope aligns with factors that theory suggests are likely to exacerbate implicit bias: Decisions based on subjective standards, made by managers who know one another, using inadequate information, under time pressure, about people whose demographic characteristics are not consistent with those of individuals who stereotypically occupy that role.<sup>273</sup> By defining a small putative class with geographic, institutional, and domain or role specificity and emphasizing the relevance of research on the specific situations under which implicit bias is most likely to operate, litigants could thus limit and respond to concerns that a finding

---

<sup>270</sup> David L. Faigman et al., *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. CHI. L. REV. 417, 419 (2014).

<sup>271</sup> See, e.g., *Jorgenson v. Vener*, 616 N.W.2d 366, 372 (2000) (recognizing decreases in probability of recovery as an injury under "loss of chance" doctrine).

<sup>272</sup> See, e.g., Mahzarin R. Banaji et al., *When Bias is Implicit, How Might We Think About Repairing Harm?*, 6 CURRENT OPINION PSYCHOL. 183, 186–87 (2015) (proposing use of alternative remedial frameworks for harm suffered as a result of implicit bias, based upon the superfund, emissions trading, and insurance models).

<sup>273</sup> Girvan et al., *supra* note 73; DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY ch. 18 (2002).

of liability would commit the courts to addressing the phenomenon of implicit bias writ large.

Further, courts may be concerned that, if practical, effective interventions for implicit bias are lacking, money damages will simply push the remedies considerations further down the road. If implicit bias is pervasive and not abatable, the same defendants are likely to be brought back to court every year or two for essentially the same thing. Moreover, in certain contexts, such as jury selection and the death penalty, it may be impossible to determine how much to award and to whom it should go to.

In such circumstances, or to the extent that equitable remedies in the form of injunctions against implicit bias are otherwise desirable or necessary, parties may also be able to address remedies concerns by de-emphasizing the need for the court to award particular equitable relief now. When faced with a socially desirable activity that creates a permanent nuisance (i.e., one for which there is no available solution) courts have balanced the harms by issuing injunctions against defendants and then staying the injunctions to allow the defendants time to develop a practical solution.<sup>274</sup> In cases involving non-purposeful discrimination, a similar proposal could incentivize a defendant to use the insights and recommendations from laboratory research to develop their own intervention while alleviating the judges' concern that nothing can be done.

A second set of options involve procedural mechanisms that take remedies considerations out of the hands of the judges who are making liability decisions. It may be possible to do this by, for example, requiring strict adherence to a liability and remedies phase in which the former must be determined conclusively, including any appeals, before the trial court begins work on the latter. Separating the phases only in the trial court, while more procedurally expedient, would leave appellate courts faced with the same potential for remedies concerns to impact substantive judgments.

A final, and perhaps the most fruitful, approach may be to rely upon the voluntary efforts of the parties themselves to develop viable solutions. Although judges may be unwilling to find defendants liable for non-purposeful discrimination in disparate treatment cases, if a claim can be stated for purposeful discrimination, any settlement of the claim, including potential consent decrees, may include steps targeted

---

<sup>274</sup> Robert Allen Sedler, *Conditional, Experimental and Substitutional Relief*, 16 RUTGERS L. REV. 639, 717–18 (1962).

towards reducing implicit bias.<sup>275</sup> In a similar vein, where courts are unwilling to create duties to address implicit bias, parties may negotiate them in advance. Thus, unions, for example, may insist on provisions protecting their members from non-purposeful discrimination and develop processes and remedies to be used when these provisions are violated. Indeed, the graduate students at the University of Washington appear to have done just that by negotiating protections against subtle forms of racism and sexism into their collective bargaining agreement.<sup>276</sup> In combination with grievance provisions and other mechanisms, such as arbitration clauses, parties may thus require institutions to proactively explore ways to reduce implicit bias based upon contractual obligations rather than relying upon Constitutional or statutory antidiscrimination law.

### CONCLUSION

Among the central observations of scholars working at the intersection of psychology and law is that judges regularly make assumptions about human behavior but rarely evaluate those assumptions against available scientific research. Where the assumptions are accurate, this tendency is perhaps benign. Where there is a gap between the legal doctrine and our best empirical

---

<sup>275</sup> See Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 478 U.S. 501, 522–23 (1986) (“[I]t is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree. Consequently, whatever the limitations Congress placed in § 706(g) on the power of federal courts to impose obligations on employers or unions to remedy violations of Title VII, these simply do not apply when the obligations are created by a consent decree.”); United States v. Krilich, 303 F.3d 784, 793 (7th Cir. 2002) (enforcing a consent decree even though under subsequent statute the EPA would not have been able to get a similar verdict); 46 AM. JUR. 2D *Judgments* § 189 (2016) (“Under a consent decree, a party can agree to greater obligations than could be achieved if the suit were to go to trial; however, a consent decree cannot oblige a party to perform illegal conduct. The entry of a consent judgment is inappropriate and the judgment itself is unenforceable when the agreement it encompasses or the relief it grants is illegal or inconsistent with the law underlying the agreement. An agreement underlying a consent decree may be held void as contrary to public policy if it is clearly contrary to what the constitution, the statutes, or the decisions of the courts have declared to be the public policy or if it is manifestly injurious to the public welfare. Nevertheless, a court is not barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial, even where the court might lack authority under the governing statute to do so after a trial.”).

<sup>276</sup> Peter Schmidt, *Campaigns Against Microaggressions Prompt Big Concerns About Free Speech*, CHRON. HIGHER EDUC. (July 9, 2015), <http://chronicle.com/article/article-content/231459/>.

understanding, however, this failure can threaten the accuracy, consistency, and legitimacy of the legal system. Identifying these gaps and advancing a normative justification for an evidence-based jurisprudence is a critical first step. It is also important to figure out why they persist and what it needed in order to close them.

Focusing on the gap between the law of discrimination and contemporary psychological science of implicit bias, there is reason to believe that, among the primary reasons judges refuse to conform the law to the science is a concern about the remedies implications of using the civil legal system to address subtle, pervasive sources of discrimination. To the extent that this is true, it implies that advancing research and testimony about the implicit bias and the injuries that likely result from it will have limited impact, and, depending upon the scope, may even be counterproductive. Instead, advocates for expanded antidiscrimination rights should work to actively adopt strategies that limit or address remedies concerns. Further, it suggests that there is an urgent need for psychologists to develop and test practical interventions for reducing implicit bias that can directly alleviate a judicial concern that, when it comes to implicit bias, there is nothing that can be done. In this way, psychologists and lawyers may be able to place injury from implicit bias within antidiscrimination law's grasp.

APPENDIX A  
CASES REJECTING IMPLICIT BIAS

Case	Explanation
Jones v. Nat'l Council of Young Men's Christian Ass'ns of the U.S., 34 F. Supp. 3d 896, 901 (N.D. Ill. 2014)	The court held that "[the plaintiffs] cannot use [Dr. Greenwald's] opinions to support their intentional discrimination claims, since Dr. Greenwald's opinions speak only to the question of implicit, or hidden, bias—not intentional acts."
Pippen v. State, 854 N.W.2d 1, 8 (Iowa 2014)	The court affirmed judgment of the trial court against plaintiffs who sued the State of Iowa for discriminatory hiring practices in its executive branch, holding that evidence of pervasive implicit bias as described by expert witnesses was not sufficient to find that discrimination had occurred.
Karlo v. Pittsburgh Glass Works, LLC, No. 2:10-cv-1283, 2015 WL 4232600, at *9 (W.D. Penn. July 13, 2015)	"Where, as here, a plaintiff asserts a disparate treatment claim, he or she must 'prove that intentional discrimination occurred at th[e] particular [employer], not just that gender stereotyping or intentional discrimination is prevalent in the world.'" (alteration in original) (quoting E.E.O.C. v. Wal-Mart Stores, Inc., No. 6:01-CV-339-KKC, 2010 WL 583681, at *4 (E.D. Ky. Feb. 16, 2010).
State v. Martin, 773 N.W.2d 89, 102 (Minn. 2009)	"Martin argues that the district court should be alert for a prosecutor's subconscious, implicit bias, in addition to the more obvious and explicit purposeful discrimination. Martin does not cite to any cases that support his argument that the district court should look to implicit, in addition to explicit, bias in <i>Batson</i> challenges, nor does he detail how a court should investigate implicit bias. Our case law under <i>Batson</i> is well established. We see no reason to extend existing law to include 'implicit bias.'" (citations omitted).

Case	Explanation
State v. Saintcalle, 309 P.3d 326, 341 (Wash. 2013)	On appeal from a conviction of felony murder, the defendant alleged that the prosecution's peremptory strike of a Black juror was motivated by implicit bias. The court agreed that implicit bias is endemic and that something ought to be done with the peremptory strike rules in voir dire, but declined to establish a new set of rules because no new rules had been suggested by the appellant. The court also believed new rules should be written by the rules committee, not the court.
United States v. Ray, 803 F.3d 244, 258–61 (6th Cir. 2015)	The court recognized that implicit bias in jury selection could be aroused with the use of the word "felon." But it found that the word was used in voir dire in order to dismiss jurors who would be prejudiced by the term. Additionally, the term was stipulated to as a fact of the case by both parties. The court did not introduce implicit bias into its doctrine, but accepted its use in voir dire.
State v. Addison, 87 A.3d 1, 191 (2014)	The court held here that the social scientific evidence of implicit bias presented by the defendant to show discriminatory sentencing for his conviction was not "exceptionally clear proof" that the discrimination in this case was purposeful.
Burrell v. Cty. of Santa Clara, No. 11–CV–04569–LHK, 2013 WL 2156374, at *34 (N.D. Cal. May 17, 2013)	The court found that evidence of the existence of implicit bias was still evidence to show that a particular employment practice of the defendant had a disparate impact on the Black plaintiffs.
Acosta v. Huppenthal, No. CV 10–623–TUC–AWT, 2013 WL 871892, at *15 (D. Ariz. Mar. 8, 2013)	Students and teachers made a claim of unconstitutionality of an Arizona statute banning race-related education in public schools. The court held that evidence of implicit bias was insufficient to show intentional discrimination by lawmakers and state officials against Latinos.

APPENDIX B  
CASES ACCEPTING IMPLICIT BIAS

Case	Explanation
<p>Samaha v. Wash. State Dep't of Transp., No. CV-10-175-RMP, 2012 WL 11091843, at *4 (E.D. Wash. Jan. 3, 2012)</p>	<p>Plaintiff of Arab descent sues employer for discrimination and calls on Dr. Anthony Greenwald as expert witness on implicit bias in the workplace. The court held that Dr. Greenwald's demonstrated expertise in the area of implicit bias and discrimination meant his testimony would be admissible despite his lack of statement on the relation of his knowledge to the facts of the case.</p>
<p>Kimble v. Wis. Dep't of Workforce Dev., 690 F. Supp. 2d 765, 778 (E.D. Wis. 2010)</p>	<p>The court ruled in favor of Black male employee of the Wisconsin Department of Workforce Development who alleged discrimination is the dispersion of pay-raises by his supervisor. The decision was not based on evidence of implicit bias, but the court cited evidence of implicit bias in the supervisor's behavior as complimentary evidence to the plaintiff's claim, implying that such evidence could be considered in claims under Title VII.</p>

APPENDIX C  
CONCURRENCES, DISSENTS, OR IMPLIED ACCEPTANCE OF IMPLICIT  
BIAS

Case	Explanation
State v. Sherman, No. 97840, 2012 WL 3765041, at *11 (Ohio Ct. App. Aug. 30, 2012) (Stewart, P.J., concurring)	“[T]he disparity in sentencing of these individuals who are so similarly situated, save race or ethnicity, at least requires consideration of what impact unconscious preferences or biases may have played in the disparity.”
Commonwealth v. McCowen, 939 N.E.2d 735, 766–70 (2010) (Ireland, J., concurring)	Here a defendant appealed his conviction. The court held that his rights had not been curtailed by the trial court allowing jurors to remain on the jury who might have been implicitly biased against the defendant. The concurring opinion noted that implicit bias could have been better explored in the proceeding and would have been helpful to coming to a conclusion.
State v. Santiago, 122 A.3d 1, 96 (Conn. 2015) (Norcott, J., concurring)	In a case concerning capital punishment, the concurrence specifically discussed the racial disparities of capital punishment, writing that “[i]t likely is the case that many, if not most, of the documented disparities in capital charging and sentencing arise not from purposeful, hateful racism or racial animus, but rather from these sorts of subtle, imperceptible biases on the part of generally well-meaning decision makers.”
Diaz v. Jiten Hotel Mgmt., Inc., 762 F. Supp. 2d 319, 327 (D. Mass. 2011)	In this workplace discrimination case, the court found that it needed to give weight to all the factors that could lead to a conclusion that discrimination occurred. Among these factors, the judge writes that new knowledge of implicit bias is best served by an examination of the totality of the circumstances.



Case	Explanation
Wells-Griffin v. St. Xavier Univ., 26 F. Supp. 3d 785, 793 (N.D. Ill. 2014)	A former Black employee of the university claimed workplace discrimination against her former employer. The court implied an acceptance of implicit bias theory when it considered whether there was evidence to support the contention that racial stereotypes played a role in Wells-Griffin's treatment at work.

